UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Gilbert N. Faford, II,

Plaintiff,

-v- Case No. 19-10523

Grand Trunk Western
Railroad Company,

Defendant.
_____/

MOTION HEARING
April 12, 2021

BEFORE THE HONORABLE DAVID M. LAWSON
United States District Judge

HEARING CONDUCTED VIA VIDEO CONFERENCE
ALL PARTIES APPEARING REMOTELY

APPEARANCES:

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April 12, 2021
10:06 a.m.

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THE COURT: We will call this session of Court to order. This is a session of the United States District Court for the Eastern District of Michigan, being conducted via video teleconferencing technology because the proceedings cannot be conducted in person without serious harm to public health and safety.

This is a session to address six motions in limine filed by the parties in anticipation of an upcoming trial in the case of Faford versus Grand Trunk Railroad, Case Number 19-10523.

May I have appearances for the plaintiff, please, starting with Mr. Pearlman?

MR. PEARLMAN: Yes, your Honor. Arvin Pearlman, one of the attorneys appearing on behalf of plaintiff, Gilbert N. Faford, II.

MR. WILENSKY: Good morning, your Honor. Benjamin Wilensky also for the plaintiff, Mr. Faford.

THE COURT: Is your client present?

MR. PEARLMAN: He will be present, I believe at 10:30, your Honor.

THE COURT: Okay. Thank you. He is not in your office? He'll be joining from elsewhere?

MR. PEARLMAN: He'll be joining us remotely.

THE COURT: Thank you.

May I have appearances for the defendant, please, starting with Mr. Russell?

MR. RUSSELL: Yes, your Honor. This is Charlie Russell for the defendant, Grand Trunk Western Railroad Company.

MS. O'DONNELL: And Mary O'Donnell on behalf of defendant, Grand Trunk Western Railroad Company.

THE COURT: All right. We have several motions in limine and they are -- they cover a variety of areas of evidence.

I would like to spend an efficient amount of time on them, so I'm thinking that maybe I'll permit argument of about five minutes on each point.

We will begin with the plaintiff's motion in limine which is Docket Number 109, in which the plaintiff identifies 10 items of evidence that it wishes to preclude the defendant from offering at trial.

The first has to do with Railroad Retirement Board benefits.

And who is taking this motion?

MR. PEARLMAN: Your Honor, Arvin Pearlman, for the record. I will be -- for your information, I will be arguing the 10 points on plaintiff's motions in limine.

Mr. Wilensky will be responding to the defendant's first motion, which I think contains 15 points.

I will argue the second motion, and the fourth and fifth motions by the defendants, and Mr. Wilensky will argue the third motion.

THE COURT: Go ahead and address your first point, Mr. Pearlman.

MR. PEARLMAN: Thank you, your Honor.

The first motion that we filed was to preclude evidence of plaintiff's receipt of collateral source benefits.

Mr. Faford, as a railroad employee, was entitled to receive sick benefits from the Railroad Retirement Board, which he did for a limited period of time. The thrust of our motion is simply based on Eichel versus New York Central Railroad Company at 375 U.S. 253 where the United States Supreme Court basically held that the payments of railroad retirement benefits were inadmissible as a collateral source.

THE COURT: All right. Thank you. I think I understand your position.

And just so we can move this record along for the court reporter, Eichel is E-i-c-h-e-l.

Who is responding to this motion?

MR. RUSSELL: I am, your Honor. Charlie Russell on behalf of Grand Trunk.

THE COURT: Mr. Russell, do you have any dispute that

Railroad Retirement Board benefits as an item of evidence should not be received?

MR. RUSSELL: Basically -- sorry. Excuse me.

Basically, no, your Honor. My only comment would be they are not, per se, inadmissible. They are only admissible if the plaintiff opens the door. If he does that during the trial, we will agree to approach and obtain your Honor's permission before we get into it. But there is really not a big dispute on this.

THE COURT: All right. That portion of the motion is granted, subject, of course, to anything that occurs at trial that might change the ruling, and I instruct the defendant that if you intend to offer evidence on that point that you should seek a discussion with the Court out of the jury's presence beforehand.

The second item is evidence of non-back-related medical conditions. The plaintiff seeks to exclude, though, any evidence that does not relate to treatment for his back injuries, and I'm not sure that there is much of a dispute about that, either. But go ahead, Mr. Pearlman.

MR. PEARLMAN: Well, your Honor, I am not -- I don't know if there is a dispute or not. Our position basically is, this is a back injury case. The defendants have raised the issue that their expert Dr. Dawkins believes that a history of nicotine use, obesity, has something to do with his back

problems.

I suspect that we can't object to those records, but there are a multitude of records that have been listed that have nothing to do with his back condition, his dental records, his family physician records, and there is no way that the defendants can establish that any of these other conditions, in fact, disabled him.

As a matter of fact, their position through Dr. Dawkins is that he is not disabled and he can go to work. So we think that any records other than the ones I just mentioned, and records, obviously, regarding his back should not be admitted.

THE COURT: All right. Thank you. I understand your position.

Mr. Russell?

MR. RUSSELL: Yes, your Honor. Our position is this: Mr. Faford has repeatedly denied, to virtually every single treating physician he has seen, these injuries, having any prior medical history at all, including the back.

There are records showing that he had prior shoulder injuries. There are records showing that he had a whole host of other medical conditions, and it's relevant -- this evidence is relevant to impeach Mr. Faford for these untrue statements he made to his physicians about no prior medical history.

So while we agree that the injuries are limited to the

back in this case, that Mr. Faford did not tell his physicians the full story is relevant. So it's relevant to impeach his credibility as a witness.

So for that reason -- and as to the chronic obesity, tobacco use, and prior back injuries, I think, you know, the parties agree those are relevant medical conditions because they can cause the exact same injuries that Mr. Faford is claiming, and there is peer-reviewed scientific literature that's relied on by Dr. Dawkins in support of those opinions.

So that's our position. We believe that other medical conditions are relevant to impeach the plaintiff's credibility.

THE COURT: Mr. Pearlman?

MR. PEARLMAN: Just quickly, your Honor.

I mean, if he had a prior shoulder condition or injury and he didn't remember it and he doesn't acknowledge it and they are trying to impeach him on it, this is -- what's probative about that? It's -- it just gets into a multitude of records that have nothing to do with this case.

Yes, if Dr. Dawkins is going to utilize nicotine history, obesity, that's one thing. But dental records, family physicians? He had a complaint of a kidney problem at some point. Nobody is going to testify that those conditions, in fact, disabled him from working. So we see those as completely irrelevant and just protracting the trial without necessity.

THE COURT: I'm not sure what exactly the evidence is.

I haven't been favored with the exact medical records that the defendant seeks to offer, and therefore, it's difficult for me to assess whether or not any prior alleged statements could be considered as untrue statements.

For example, if a physician says to the plaintiff -- rather, not says -- but poses a direct question, "Have you ever had a shoulder injury," and the plaintiff says, "No, I never had a shoulder injury," but there are records that suggest otherwise, that might amount to an untrue past statement.

On the other hand, if the physician says, "How are you feeling and do you have any other complaints," and he says, "No," that certainly wouldn't amount to an untrue statement, necessarily. So it really depends on context.

Those prior inconsistent statements, however, don't seem to be relevant unless they have to do with the injuries that are complained of here, unless they can be found to be acts of dishonesty that could affect the plaintiff's credibility, in which case we're dealing with whether or not a proper foundation can be laid under 608(b).

So I'm going to grant the motion to the extent that a generalized introduction of prior medical records that are not related to causation of the presently claimed disability resulting from the injury at work would be probative.

If the defendant believes that a proper foundation can be laid under Rule 608(b) I will entertain that request at

trial if I can determine in context that that's relevant.

So the motion -- that part of the motion is granted in part.

Next has to do with the employment application at Grand Trunk and I think we're going to be going down pretty much the same line there, but go ahead, Mr. Pearlman.

MR. PEARLMAN: Yes, your Honor. We're asking the Court to preclude introduction of the plaintiff's employment application.

Now, the defendant has indicated that they are not going to argue that had he answered questions on that application differently regarding prior back incidences or conditions that they would not -- that they still would have hired him. They are not going to argue that they wouldn't have hired him. But they want to offer, I suspect, the application to impeach Mr. Faford.

However, we submit that until Mr. Faford is asked, did he indicate on his application any prior back problems, and if he testifies, no, he did not, then there is no relevancy to the application, which contains a lot of other information.

So I submit that until they -- until the defendant has properly questioned Mr. Faford on that, and what I'm suggesting is that if they ask Mr. Faford and he says, yes, I told them about back issues, then I think introduction of the application would be proper to impeach him.

If he says no, then what's the value of the document? He has already testified that he didn't indicate any prior back issues.

THE COURT: Okay. Mr. Russell?

MR. RUSSELL: Yes, your Honor. I think your Honor hit the nail right on the head. It's the same issue as the last motion, except in this application he denied ever having any back problem, injury, pain, disorder, as part of his entrance-into-service physical.

Now, Mr. Faford testified in his deposition that everything on that form was in his handwriting; everything on there was truthful, accurate, and complete. And he knew that if he made false statements in order to obtain employment it could be grounds for termination.

Now, Mr. Pearlman is correct, we are not going to argue or contend that we wouldn't have hired him or we would have fired him if he had been untruthful, but this statement where he denies ever having the exact same thing that he is suing my client for, when, in fact, the records from Ford Motor Company show he had multiple prior back injuries is relevant to his credibility as a witness. It could be used to impeach him. And it's just a -- you know, it's a fairly straightforward issue here.

THE COURT: Anything else, Mr. Pearlman?

MR. PEARLMAN: No. I think it just becomes an

irrelevant document if he answers the question as I am certain he will.

THE COURT: Well, there are two things at play here. One is whether or not the document can be introduced as a prior inconsistent statement, which I think is really not something that is going to come up, because he's not going to testify, based upon all the information I have seen on this case, that he told Grand Trunk that he had prior back problems, because he maintains that he never did.

So whether it's a prior inconsistent statement under Rule 613(b), I think, really is not going to come into play at all here. The question is whether or not it can be used to impeach his credibility as a prior false statement or prior false act, and that depends on Rule -- the governing rule is Rule 608(b). And the question is whether or not extrinsic evidence can be used to prove that the defendant engaged in a prior act of dishonesty, and Rule 608(b) will govern.

The plaintiff can be asked on cross examination about his prior representations, and then the rule says that depending on what the plaintiff says, the defendant has to take the answer. As to whether extrinsic evidence can be introduced on that point, the rule is pretty clear that it cannot, unless, of course, it has to do with a matter that is not collateral.

Now, the defendant's prior back injuries are not collateral because the defendant argues -- I'm sorry -- the

plaintiff's prior back injuries are not collateral because the defendant argues that the plaintiff brought his problems to work with him and that they were not caused on the job. But that employment application really doesn't have anything to do with that point, because it's proves the negative, or it would prove the negative had it been true, so we will have to wait to see how that plays out at trial.

The evidence is not admissible for the purpose -- for one of the purposes the plaintiff is concerned about, but the defendant maintains that it will not be offering the evidence for that purpose anyway; that is, that they would not have hired the plaintiff had his information on the application been different.

So I'm going to grant that motion in part, deny it in part, and before that application is referenced or offered into evidence at trial a proper foundation under Rule 608(b) must be laid. And before it is identified as an exhibit or offered into evidence the defendant must seek permission of the Court outside the jury's presence.

The next item has to do with photographs of the plaintiff's house and Mr. Faford's wife's income.

I think the defendant agrees that his wife's income or any source of revenue coming from his wife is irrelevant and does not intend to introduce that.

The next question has to do with whether or not

photographs -- and I take it it's photographs and not videos, but you can clarify that -- are relevant.

Go ahead, Mr. Pearlman.

MR. PEARLMAN: Thank you, your Honor.

They are photographs which we just recently have seen; however, there is absolutely no probative value to these photographs. They don't prove anything. They are just photographs showing a house and a lot and a garage, and the defendant's speculation that because he has got a garage he must be doing auto repair in that garage. Because there was a boat next to the garage, he must be doing repairing -- doing repairs on a boat. All speculation. There is no proof of that.

Also, the photographs are quite misleading, because Mr. Faford lives right next to a railroad track and within a stone's throw of a railroad yard, none of which is depicted in these photographs. So the only purpose of the photographs can be to implant in the minds of the jury that Mr. Faford lives on this large estate property.

The other argument that the defendants make is that he testified that he goes out and walks as much as he can.

Number one, there is no medical evidence that says that he is incapable of walking.

And number two, again, speculation that because of this lot that the house is sitting on he must walk the

perimeter of that lot, that he is, therefore, not disabled. Again, this is all speculation. There is no probative value to these photographs.

The defendant ties in another exhibit regarding the purchase of auto parts which I think we're going to address in a different motion, but everything that the defendant is saying is speculation, not probative, and therefore, irrelevant.

THE COURT: Mr. Russell?

MR. RUSSELL: Yes, your Honor. I view this as kind of a thinly veiled attack on the surveillance video that we have of Mr. Faford. And if we're just talking about photographs of the plaintiff's home, that's one thing, but the problem with this is, your Honor, we believe that Mr. Faford's home also doubles as a business. Mr. Faford has a fully functional auto garage that's just behind his home which is depicted in the surveillance video. Mr. Faford claims --

THE COURT: Mr. Russell, I understood this motion had to do with still photographs. We're not talking about a surveillance video.

MR. RUSSELL: If that's -- if that's what we're talking about, your Honor, I understand that, that's fine. But we may use still shots from the surveillance video to depict his auto garage, to show the boat located outside his auto garage that he claims he doesn't own that belongs to a friend. And then, you know, three days prior to the surveillance video

that shows him going in and out of his garage, walking by this boat, Mr. Faford made a substantial purchase of boat parts. So as long as we're talking about still photographs of the plaintiff's home, that's one thing.

But this household income and assets, keep in mind, he has his auto garage behind his house. He is buying auto parts consistently, all the time, thousands of dollars, and he claims he has no sources of income.

So we believe the circumstantial evidence is that he has this auto garage where he does auto repairs and boat repairs. The financial records show him making substantial purchases of parts. He is going in and out of there. He has friends over there. He has a boat located there that he says he has one in his name, but it belongs to a friend, and he made a purchase of boat part three days before the surveillance video.

But as long as we're talking about still photographs of the plaintiff's home, that's one thing, but if they are trying to broaden this into some exclusion of the surveillance video, we have a very serious objection to that.

THE COURT: Mr. Pearlman, I understood your motion to be directed at still photographs; is that correct?

MR. PEARLMAN: You are correct, your Honor.

THE COURT: All right. That motion is granted.

Next, with respect to -- excuse me. The motion

is granted because I find that the still photographs are irrelevant, and largely, will be probably cumulative of the surveillance video, although I must confess I haven't seen either. So that's not a definitive ruling, and if counsel believes that the still photographs have some relevance, we can take that up again in context of the trial.

With respect to the debit and credit card records, are you contesting the admissibility of the debit and credit card records relating to purchases of boat and auto parts -- boat parts and auto parts, Mr. Pearlman?

MR. PEARLMAN: Yes, I am.

THE COURT: Okay. Tell me why.

MR. PEARLMAN: Well, first of all, our position is that this list is again purely speculative. Mr. Faford has testified that between his wife's car and his kid's car, his car, his parents' car, he is constantly buying auto parts for repairs. He has testified that he has not done these repairs since August 3rd other than maybe minor repairs. And so we don't know from this list whose vehicle was used. It's speculative, number one.

And number two, it includes a year and a half period where Mr. Faford returned to work after his January 3rd, 2017, injury, worked consistently until August 3rd, 2018, was not under any restrictions, was not under any limitations, so that the exhibit itself is misleading and irrelevant as far as we're

concerned.

THE COURT: All right. Mr. Russell?

MR. RUSSELL: Your Honor, it's the same issue, like I said, with the last motion. We believe this goes directly to mitigation, damages, failure to mitigate.

Mr. Pearlman's argument that there is no evidence that he actually earned money is irrelevant. It's whether he is capable of it. And our position is, the circumstantial evidence, him going in and out of his auto garage with the boat parked there that he claims he didn't own that he is buying parts for. And it's not just minuscule. It's 20 different stores, your Honor. It's all over the Flat Rock area, and it's thousands of dollars.

THE COURT: All right. Is there evidence that you intend to offer about purchases that you describe before the August injury?

MR. RUSSELL: No, your Honor.

THE COURT: Is it all after the August injury?

MR. RUSSELL: I believe so. I think there may be some boat purchases, auto parts purchases, I'll have to go back and look, between the 2017 and 2018 injury, but I feel --

THE COURT: Do you intend to offer any other evidence of purchases from the debit or credit cards other than boat and auto parts purchases after the August 2018 injury?

MR. RUSSELL: The only other category of purchases,

your Honor, are tobacco products. Mr. Faford, all the time, reports to his physicians that he is not smoking. Our position is tobacco use, nicotine, is a vasoconstrictor. It causes degenerative disk disease. Our experts are going to testify to it.

These records also show, and Mr. Faford testified in his deposition, that he is making substantial purchases of tobacco products after these injuries and during all relevant time periods.

So we would also offer them for that, that purpose as well.

THE COURT: Mr. Pearlman, anything else?

MR. PEARLMAN: I'm just trying to figure out, Judge, because the chart as I saw it contains 2017 entries, 2018 entries. So is the defendant saying that they are going to edit that chart and not offer any items prior to August 3rd? Is that what I understand the defendant's position is?

MR. RUSSELL: No, your Honor, I --

THE COURT: I'm not sure what the defendant's position is on that, Mr. Pearlman, but I just want to hear your final summation on this so I can make a ruling.

MR. PEARLMAN: Yes. Thank you. I think that they are irrelevant. I think entries of purchases of tobacco doesn't prove anything. What's the probative value of it?

THE COURT: He just explained that, Mr. Pearlman. He

said it has to do with his -- your client's denial to his physician that he smokes and that continued smoking can aggravate the disability caused by whatever injury he has, although I'm not -- I'm not sure how that evidence would be relevant as to whether it is a cause by itself or whether it simply aggravates a condition that was caused by an injury received on the job, and without some way to connect that up I have some questions about it.

Do you have anything else, Mr. Pearlman?

MR. PEARLMAN: Yes. The only other point is that Mr. Faford has never denied that he chewed tobacco. It's in his medical records that he does use chewing tobacco. Again, I think it's irrelevant. I just don't see the probative value of that.

THE COURT: All right.

MR. RUSSELL: Your Honor, just to answer your question from earlier, we do not intend to offer evidence of boat and auto part purchases until after the August 18 injury. And so if we use that chart, it would be revised to redact out the 2017 purchases when Mr. Faford was employed.

THE COURT: All right. The motion is granted in part -- or this aspect of the motion is granted in part and denied in part. The defendant may offer evidence of boat and auto purchases that occurred after the August 2018 injury. Before that time, the evidence would be irrelevant. Other

purchases likewise would be irrelevant.

As to purchases of tobacco products, I don't suppose that those credit card statements contain itemized lists of what's been purchased, and I'm not sure that any of that is relevant and they won't -- should not be offered until there is a proper foundation laid to establish the relevance, if any, of that information concerning tobacco purchases.

Next, the plaintiff seeks to exclude evidence of articles and opinions on secondary gain which the defendant apparently intends to use to question the plaintiff's expert witnesses about.

We have already been down this road before and I have excluded that evidence, and I believe it was a Daubert motion that was filed by the plaintiff, but this looks like it is a slightly different purpose to cross examine defendant's -- plaintiff's experts.

But go ahead, Mr. Pearlman, on that part of your motion.

MR. PEARLMAN: Well, I do agree with the Court, we have dealt with this motion, and the Court issued an order on the Daubert motion regarding Dr. Dawkins. The issue that we have with this issue is, number one, there is no way that the defendant is going to authenticate these studies since Dr. Dawkins has been excluded to render any opinion on it.

Dr. Aleem has already been taken and he is -- his

testimony is done. Mary Monte that the defendant's speak of is not a -- she is a physical therapist. I don't know how they would qualify her to render an opinion on a peer review study regarding medical doctors.

So you have already ruled on it regarding Dr. Dawkins. I don't see the difference in why it should be different with any of the other offers that the defendants may attempt in trying to get that -- those documents into evidence.

THE COURT: All right. Mr. Russell?

MR. RUSSELL: Yes, your Honor.

These articles that Mr. Pearlman is talking about can be used in a way where the term "secondary gain" and "recall bias," which were the two terms your Honor was concerned about on the Daubert motions as impugning Mr. Faford's credibility, having an expert testify about whether a witness is credible or not.

The problem here is that Mr. Faford's physicians, his experts, without conducting a forensic review of his lifetime medical records, the ones that have been produced in this case, simply rely on what Mr. Faford tells them in terms of his prior medical history and past injuries.

And the problem with that is, there are peer reviewed scientific studies that say that the premise that examining self reports are scientifically reliable have repeatedly failed scientific testing. And it's our position that those experts

should have done more than simply take Mr. Faford's word for it and that their opinions are unreliable, the weight of their opinions. The jury should disregard or give it the weight that it deserves, because all they have done is listen to Mr. Faford. And, quite frankly, he provided a vastly incomplete prior history.

He tells his physicians over and over and over, never had any prior back problem, never had any prior back injuries. So these articles that we're talking about can be used in a way with -- to impeach these experts without ever mentioning secondary gain and recall bias, which were the terms at issue in the Dawkins motion.

THE COURT: Well, couldn't you impeach the experts without even mentioning the articles?

MR. RUSSELL: More than likely, yes, your Honor. But the fact that there is scientific -- peer-reviewed scientific literature that explains that there is, you know, things they should have known about, they should have known better than not to do that, and they based their treatment decisions, their diagnoses, on inaccurate, incomplete statements of Mr. Faford about his prior medical history.

THE COURT: Is there any evidence that they relied on those articles in formulating their opinions?

MR. RUSSELL: Not that I know of, your Honor.

THE COURT: Is there any evidence that they are even

aware of those articles?

MR. RUSSELL: Well, some of them haven't even been deposed yet, so I don't know the answer to that question.

THE COURT: Have you -- how do you intend to authenticate the articles?

MR. RUSSELL: Well, I intend to use them with my expert Dr. Dawkins to ask him, you know, is it reliable for the plaintiff's treating physicians to rely on the history that Mr. Faford provided. He's going to say no. And so what's the basis for that opinion? The peer-reviewed scientific literature that says examinee self-reports are unreliable.

THE COURT: All right. Mr. Pearlman?

MR. PEARLMAN: Well, I think that that's the ruling that you made in regards to the Daubert motion on Dr. Dawkins. So I don't know how they can backdoor that. And that's -- the question that you asked Mr. Russell is my question. How are they going to authenticate these peer reviewed studies? So I --

THE COURT: He just said he is going to call Dr. Dawkins, and Dr. Dawkins is going to authenticate them.

MR. PEARLMAN: Well, except for the fact that you've already ruled that Dr. Dawkins can't testify to those issues and that seems to me to be a backdoor way of getting those articles in. So I would object on that basis.

THE COURT: Well, I'm not sure that those articles

would be admissible under Rule 803, paragraph 18. I'll leave it to counsel to try to authenticate them under that rule if they can be used. That really kind of calls into question an order of proof, but we will have to cross that bridge as well.

I don't see that there is any objection to allowing cross examination of your expert witnesses on the point of whether it's prudent to accept a self-report from a patient concerning a diagnosis.

I mean, doctors do have to take history and do have to make an assessment about whether or not there is something that should call into question what the patient is reporting. Doctors do that all the time.

But that motion to exclude, in advance, expert testimony about the propriety of accepting self-reports would be denied. The effort, however, to tie that into issues relating to secondary gain and recall bias, however, would be granted.

Moving on to --

MR. PEARLMAN: I'm sorry, Judge. I don't mean to interrupt, but would the defendant be precluded in opening statement from making reference to those articles until they have been properly qualified and admitted?

THE COURT: I think that a defendant or any party takes a great risk in making reference in opening statement to evidence that is of questionable admissibility, because the

fact of promising information that ultimately may not be able to be delivered is a hazard, I think, that is difficult to overcome. That -- I think it would be imprudent because it also might provoke a mistrial. So I'll just leave it at that.

MR. PEARLMAN: Thank you, your Honor.

THE COURT: Next, concerning evidence about lack of communication of workplace hazards, I believe that the plaintiff wants to preclude evidence that Mr. Faford violated company rules by failing to inform other workers of workplace hazards after he tripped and fell in the -- in August of 2018. I think that's what the evidence is -- that's what the motion is focusing on; is that correct, Mr. Pearlman?

MR. PEARLMAN: It is, your Honor.

THE COURT: Go ahead with your argument.

MR. PEARLMAN: Basically, I rely on our brief. I just don't see -- Mr. Faford did report his injury to the supervisor. The fact that he didn't go around and tell everybody on the property that he fell or that there was debris in the area where he was walking and inspecting rail cars, I think, is irrelevant and speculative. There is no question that he reported this injury.

I'm sure that the defense attorneys can cross examine him sufficiently as to what he reported, et cetera, but I think that to speak of violating a rule -- and it probably also goes to the January 3rd, 2017, incident, where he also reported to

his supervisor, Mr. Hammock, that he got injured and where he got injured. So we just don't see the necessity of the rule and the --

THE COURT: Mr. Pearlman, just a minute, please.

Are you focusing on the August incident or the January incident? Because I understood your motion just to be focusing on the August incident.

MR. PEARLMAN: Well, it is, your Honor. It is.

THE COURT: Well then, let's leave it at that.

MR. PEARLMAN: I'll leave it at that, sir.

THE COURT: So it's -- you're saying that you're concerned about the defendant offering evidence that there is a work rule that the defendant -- that the plaintiff violated by not reporting the trip hazard in August and you're saying that he did report it?

MR. PEARLMAN: Yes. He made a report to his supervisor.

THE COURT: So what's -- so why are we dealing with this as a motion in limine? I mean, it's a contested fact issue. You're saying that he reported the incident. The defendant is going to offer evidence that he did not report it and that he made inconsistent statements, and he didn't come up with the fact that he tripped over a rock until later on when he took -- when his deposition was taken.

So those are conflicting items of evidence that the

jury has to resolve. Why are we dealing with trying to exclude evidence of one thing or another?

MR. PEARLMAN: Well, we're trying to -- our focus is on this rule, this peer communication rule, that has nothing to do with this case or this accident.

THE COURT: All right. Go ahead, Mr. Russell.

MR. RUSSELL: Yes, your Honor.

The safety rules require Mr. Faford to make a contemporaneous report of a workplace hazard to his co-workers, not only just to report the injury immediately to his supervisors. And here the evidence in the case is going to be that when Mr. Faford encountered whatever he encountered on August 3rd, 2018, there was no contemporaneous report made to his co-worker, Matt Johnson.

When he got in the truck with Mr. Johnson, he did not mention a rock or any tripping hazard. He told Mr. Johnson, "I rolled my ankle and fell." He didn't say anything about any workplace hazard. It's undisputed he did not do that. And it's our position that because of that obligation to make immediate and contemporaneous reports to co-workers that the jury can infer that no such workplace hazards existed. And so that's our position on this motion.

THE COURT: All right. Where is that work rule established?

MR. RUSSELL: It's in the safety rules that are issued

to Mr. Faford and govern his work, the life safety rules. It's one of the trial exhibits.

THE COURT: Okay. The relevance of that is perhaps marginal, but relevancy is established by a relatively low threshold; consequently, the evidence certainly is not -- there is no unfair prejudice resulting from the evidence, and it is relevant. The motion is denied in that respect.

The next argument is Item Number 8 on that list of 10 having to do with the so-called empowerment rule, and that is whether the defendant can introduce evidence that tends to eliminate the assumption of risk as a -- or tends to revive the assumption of risk as a defense, which is not a pertinent defense under the FELA.

Go ahead, Mr. Pearlman.

MR. PEARLMAN: Well, I think that that's basically the argument. This empowerment rule shifts the burden of providing a safe place to work.

THE COURT: Well, what's the evidence that you're looking to exclude?

MR. PEARLMAN: Well, they are claiming overexertion. They are claiming that Mr. Faford didn't have to do the job if he didn't think he had the right tools. So it's a backdoor way of -- the only conclusion from that is that he assumed the risk on both August 3rd, 2018, and primarily on January 3rd, 2017.

It just -- there is clearly -- and the railroad admits

it, that there is no assumption of risk defense in FELA cases. This empowerment rule is so vague. It is so general. Overexertion to one person is not overexertion to someone else, but it's shifting the duty onto the employee.

They have every right to argue comparative negligence issues. That's certainly a defense. But we think the use of this rule is prejudicial and of no probative value.

THE COURT: Mr. Russell?

MR. RUSSELL: Yes, your Honor. This is another safety rule that goes directly to plaintiff's contributory negligence, a defense that is specifically permitted by statute.

The empowerment rule is a rule that says that when there is no specific safety rule governing a situation a railroad worker is empowered to seek out assistance, guidance from his supervisors, that he is to utilize common sense, good judgment, all the things that we're saying that Mr. Faford did not do, especially with respect to his first incident.

This motion in limine has been routinely denied by other federal courts, including the three cases that the plaintiff cites, the Stanley, Droll, and Parra cases. In those cases the Court allowed evidence of the empowerment rule, but denied a jury instruction quoting the exact language of the rule.

As for assumption of risk, this is an issue that comes up routinely in FELA cases at the jury instruction conference,

and I submit that the proper time to address it is at that conference. But this motion ought to be denied.

THE COURT: Anything else, Mr. Pearlman?

MR. PEARLMAN: No, your Honor.

THE COURT: I agree, the authority that counsel cites, Stanley, Droll, and Parra all condone, if not specifically approve, the introduction of evidence in that regard. The question does boil down to jury instruction and we will deal with it at that time.

Item Number 9 has to do with any arguments or evidence that tend to point the finger at co-workers for the unsafe condition. I'm not exactly sure what the specific evidence is that the plaintiff is concerned about here, but if there was evidence that a co-worker was responsible for an unsafe condition, I would think that that would be helpful to the plaintiff since that activity would be chargeable to the defendant in the case.

But anyway, Mr. Pearlman, what do you want to exclude and why do you want to exclude it?

MR. PEARLMAN: Well, the defendants have taken a position throughout several of the depositions taken that, for example, if there is debris in the yard it's the duty of the co-employee to pick it up when, in fact, it's the duty of the railroad to maintain a clean work environment.

There is testimony in the January 3rd, 2017, accident

that there were three shifts working in the shop back at that time, and one of the claims is that Mr. Faford, on the third shift, was not provided with updated new tools, but, in fact, other shifts did, in fact, have updated tools and that they kept them under lock and key in some type of cabinet or some type of tool box, which the implication was that it's the fault of these other employees for not releasing those tools to the third shift.

So the motion was basically filed so that we could get a clarification, can you -- yes, and I agree with you, Judge, that to blame a co-employee, they are blaming the railroad through implication, but there was argument about union -- union affiliation, that it was a question of the union, so it just seems like it's irrelevant. We're looking to preclude it.

THE COURT: What are you looking to preclude?

MR. PEARLMAN: Testimony that it's the employees who locked up their tools on the second shift's fault that Mr. Faford had an inadequate old tool to use.

THE COURT: All right. Mr. Russell?

MR. RUSSELL: Your Honor, we are not blaming any co-workers for Mr. Faford's injuries. Our position is that there were no unsafe conditions in the workplace that caused plaintiff's back injuries. So I'm like you, I don't understand what the evidence is that they are trying to preclude. You

know, we're not blaming these workers from the other shifts that locked up their tools. We don't believe the evidence is going to show that, but we're certainly not blaming any co-workers for any workplace hazards.

THE COURT: This aspect of the motion is pretty vague, as far as I'm concerned, and I can't really identify any evidence on which I can make a ruling at this point. I'm going to deny it without prejudice and leave it to the context of the trial and the contemporaneous objection custom and rule.

MR. PEARLMAN: Judge, if I may, is the defendant asserting that they will not raise that issue and point the finger at other employees as being at fault?

THE COURT: I don't know, Mr. Pearlman. You will have to take that up with Mr. Russell. That's an argument that if they point the finger at other employees for being at fault, I would think that would be at their peril, and we can take that up also at the charge conference.

MR. PEARLMAN: Thank you, Judge.

THE COURT: And then Item Number 10, the last item on the plaintiff's list, has to do with the absence of evidence, I guess. And that really, I think, is focusing on a potential argument that because no one else complained then the condition was not unsafe. I believe that's what the thrust of the argument is from the plaintiff.

But go ahead, Mr. Pearlman.

MR. PEARLMAN: No, I think you have said it, Judge. I think the fact that there is no similar injuries to other employees on January 3rd, 2017, does not imply and should not be argued that there is, therefore, no negligence. I think the case law has dealt with that issue fairly clearly. There is testimony --

THE COURT: Well, I think it has, Mr. Pearlman, but I don't think it has dealt with it fairly clearly in your favor.

MR. PEARLMAN: Well, the -- if you look at, I think, our reading of Gallick v. Baltimore & Ohio Railroad at 372 U.S. 108, I think that states the United States Supreme Court has stated clearly that --

THE COURT: Well, that was a jury instruction case, not an evidence case, was it?

MR. PEARLMAN: Well, the fact -- I think it was, but I also think that it goes to the issue of, the fact that there is an absence of an injury does not mean that the railroad is not negligent for the condition that existed on the date of the accident.

THE COURT: Well, in that particular case I thought the Court said that the evidence was relevant on the question of establishing foreseeability, although the jury should not have been instructed because that was too narrow an instruction.

And then the defendant points to Inman, Burpo, and

Ambold, in which the courts have held that that evidence is relevant or the absence of reports is relevant on the question of foreseeability. That's why I'm struggling with your position here.

MR. PEARLMAN: Well, I think that Gallick really -- our reading of Gallick is that if you can't instruct the jury about prior incidents, how can you offer that as evidence that there is no negligence?

THE COURT: Well --

MR. PEARLMAN: Maybe I'm --

THE COURT: I would -- I'll deny the motion to the extent that it seeks to preclude the defendant from arguing that there was no foreseeable risk or workplace hazard because no one ever reported a hazard as a result of -- a hazard resulting from bad stairs, worn-out wrenches, or trip hazards in the yard. So that aspect of the motion is denied.

The next motion is Docket Number 111 in which the defendant seeks to exclude 15 categories of evidence.

Before we go into the argument of that, who is taking that, by the way?

MR. RUSSELL: I will, your Honor. Charlie Russell.

THE COURT: I think I'm going to give the court reporter and me and everyone else a little bit of a break, so we will take five minutes and we will get back to that shortly. So the Court is in recess for five minutes.

MR. WILENSKY: Your Honor, I'm sorry. I just wanted to say, I'm handling this motion for the plaintiff.

THE COURT: Thank you for clarifying, Mr. Wilensky. But we're in recess for five minutes and we will get to you then. Thank you.

(Recess taken from 11:03 a.m. to 11:12 a.m.)

THE COURT: Mr. Russell, are you ready to continue?

MR. RUSSELL: I am, your Honor.

THE COURT: Mr. Wilensky?

MR. WILENSKY: Yes, your Honor.

THE COURT: All right. Court is back in session.

Item Number 1 on the defendant's motion has to do with references to workers' compensation. I'm not sure if we really need to spend much time on this.

There may be a request for a jury instruction on that point per the previous motion argument, but I don't think anybody really contests the fact that references to workers' compensation are not relevant and generally inadmissible in cases like this.

Mr. Russell, do you have much more to say on that?

MR. RUSSELL: No, your Honor. I think the plaintiff said they only object to this to the extent it precludes an instruction. We believe an instruction is improper along those lines, but we can take that up at the jury instruction conference. We don't need to address it now.

THE COURT: Agreed, Mr. Wilensky?

MR. WILENSKY: Only that I think, your Honor, depending on the way that the proofs in this case come out it may be warranted for us to discuss this even before the jury charge conference, because the defendant is likely to try and introduce a record of plaintiff making a workers' comp claim while he was at Ford Motor Company, and we reserve objections to that. But if it's admitted, the issue of workers' comp is going to be put right in the jury's face and the jury may reasonably wonder whether, you know, any money they award plaintiff will be in addition to comp benefits received.

So if the defendant is planning to use that record, it may be that a charge along the lines of what we're talking about is appropriate during the trial and not before. But we don't intend on making any argument that, you know, he isn't eligible for workers' comp and so this is his only chance to be compensated or anything along those lines.

THE COURT: Well, if that evidence is offered and received it may bolster your position regarding a jury instruction, but we'll take that up at the appropriate time.

That motion is granted, however, that there should be no reference in evidence to workers' compensation.

Next, the defendant argues that the plaintiff should not be permitted to argue about the purpose of the Federal Employer's Liability Act or make any reference -- references

to what the law is, at least as I understand the argument. I'm not sure how far you want to go with that, Mr. Russell.

MR. RUSSELL: Not very far at all, your Honor.

The plaintiff concedes in his response that he is not going to make a comment regarding Congress's intent in enacting the FELA. Our position is that the jury is going to be instructed on the law and it should come from you, not from counsel. So I'm not sure there is a big dispute here, but our position is the plaintiffs should not be allowed to tell the jury what the law is or argue to the jury. That's the duty of the courts.

THE COURT: Are you telling me that the plaintiff shouldn't be able to tell the jury what the law requires him to prove and how he is going to prove it?

MR. RUSSELL: No, your Honor. What I'm talking about is the plaintiff should not be able to tell the jury that the FELA was enacted for the broad remedial purpose of, you know, compensating injured railroad workers.

THE COURT: Well, that's different from what you just concluded your argument with.

MR. RUSSELL: Well, that's -- that's what I meant. I'm sorry. I must have misspoke. But that's what I'm -- I'm not saying that the plaintiff can't talk to the jury or tell the jury what the elements of his claim are as set forth in the instructions you provide.

THE COURT: Mr. Wilensky, do you have any intention to argue policy here?

MR. WILENSKY: No. We're not going to be making policy arguments about what Congress intended to do by enacting the FELA. But to your point, your Honor, I think that we should be able to contextualize the facts of the case by stating generally what the law is and what we have to prove under the law and how we will meet our burden in that regard.

THE COURT: I agree that that's entirely appropriate for opening statements and closing arguments. The jury will be instructed, I think, probably repeatedly in this case that they must take their law from the Court and not from the parties, and if what you say differs from what I say they must follow what I say. That's pretty standard in every case.

On the other hand, you have to be able to identify the elements, and that is what the issues are in the case and what the evidence will be offered -- what evidence will be offered in order to establish those elements. So to that extent, the motion is denied.

Next, the plaintiff wants to -- I'm sorry -- the defendant wants to exclude evidence of any proof of the fact that the plaintiff was a good person, a good employee, or a safe worker, and acted in conformity with this trait that might evoke sympathy on his part.

Mr. Russell, if I am mischaracterizing that position,

please correct me.

MR. RUSSELL: No, your Honor. I think you characterized it correctly. There has been deposition testimony from co-workers, you know, is Mr. Faford a good, safe worker? Does he work safely on the job? And we believe that testimony has been elicited by the plaintiff's counsel in order to prove that on the dates in question Mr. Faford acted in conformity with those traits, and so that somehow because he was a good, safe worker and he had this trait that he couldn't have possibly been responsible for contributory negligence.

Contributory negligence, that defense does not make general character evidence of this nature admissible and it ought to be excluded. This is classic character evidence.

THE COURT: Mr. Wilensky?

MR. WILENSKY: Well, your Honor, I think it's true that the plaintiff's co-workers testified that he was a reliable and safe employee, but given that the defendant is advancing arguments that plaintiff caused his own injuries and they brought out testimony from plaintiff's supervisor Mr. Hammock that in his opinion Mr. Faford was an average employee who on occasion didn't work safely, I think that we're entitled to establish the plaintiff's general competency through the testimony of others.

It may also be admissible as evidence of his habit under Rule 406, in that he didn't have the habit of taking

unnecessary risks and working unsafely. So I do think that it may be admissible for that purpose, and if anything, the Court should defer its ruling.

But as we also stated in our response that, you know, if the Court grants this motion, what's good for the goose is good for the gander, and the defendant shouldn't be allowed to, you know, make an argument or put on evidence that it generally is a good employer or safe employer if this motion is granted.

THE COURT: Mr. Russell, anything else?

MR. RUSSELL: I tend to agree with Mr. Wilensky on that last point that Grand Trunk is not going to offer evidence that Mr. Faford was an unsafe employee, an average employee, to show that he acted in conformity with those traits on the day of the accident.

So our focus is on what happened with respect to each of these accidents, not someone's general character, and I think all evidence of character evidence ought to be excluded.

THE COURT: Well, evidence of character in order to prove conduct is inadmissible under Rule 404(b), first sentence, and also under Rule 401(a)(1), and I will not permit it for that purpose.

It may be admissible for other purposes, for example, if somebody were to testify, as apparently had occurred in deposition, that Mr. Faford generally was an unsafe worker, then evidence that he was not may be offered to rebut it.

As to evidence of habit, that is a pretty marginal argument, Mr. Wilensky, and it would be pretty tough to establish that. Take your best shot, but I am thinking that that's -- there is not a lot of future in that position.

Nonetheless, I'm going to deny this motion without prejudice, cautioning counsel to avoid offering character evidence to prove conduct, as the rules pretty clearly prohibit.

Next, Item Number 4, evidence of Grand Trunk's financial condition. I don't think that the defendant -- the plaintiff intends to offer any of that evidence, do you, Mr. Wilensky?

MR. WILENSKY: We do not, your Honor.

THE COURT: All right. That motion is granted for -- because the point is conceded.

Next is evidence that the plaintiff's family suffered financially, physically, or emotionally as a result of the plaintiff's individual injuries. There is no consortium claim here, and as I understand it, the defendant wants to exclude any such evidence.

This apparently is -- points out that there might be testimony which may tend to suggest the point but not entirely make it, and I'm interested in, Mr. Russell, how you propose that we draw lines here?

MR. RUSSELL: Your Honor, I think -- I think the

parties agree that the focus is on how the injuries affected the plaintiff, not his family, so as long as that is the focus, you know, we're good with it. I thought this had been conceded, but I may be wrong.

THE COURT: I think you're probably correct on that.

Mr. Wilensky, do you disagree?

MR. WILENSKY: Not really, your Honor. The only nuance here, I mean, we're -- we're going to have Mrs. Faford testify about how she has seen Mr. Faford affected by his injuries in her perception, but we're not going to be putting on testimony from her or from Mr. Faford about how Mr. Faford's injuries have affected other members of his family.

THE COURT: Well, this is where I see some problems potentially developing, and that would be testimony from his wife, for example, that she has seen her husband suffer because he has been unable to provide for his family in ways that cause them harm, grief, and emotional distress, and in turn, that causes him to be distressed as a result of it.

Do you see where I'm going with that, Mr. Wilensky?

MR. WILENSKY: I do to an extent, your Honor, but I think that to the extent that that would be affecting Mr. Faford, I think that that's fair game.

THE COURT: Well, perhaps. I guess it depends on how it's phrased.

Mr. Russell, I'm going to deny this without prejudice

and leave it to contemporaneous objections.

But you know, Mr. Wilensky, that I would not permit evidence that suggests that it would be offered in support of a consortium claim when there is no such claim.

Do you understand?

MR. WILENSKY: I do, your Honor.

THE COURT: Mr. Russell, are we clear on that?

MR. RUSSELL: Yes, your Honor, I understand.

THE COURT: Okay. Thank you.

Subsequent remedial measures, and that, I think, turns on whether or not there is evidence of feasibility, but go ahead, Mr. Russell, with your argument on that.

MR. RUSSELL: Sure, your Honor. That, you nailed the -- you hit the nail right on the head. It centers on feasibility. The plaintiff's argument is that testimony from a lay witness supervisor on cross examination during a discovery deposition where he gave his opinion over the objection of GTW counsel that a particular measure was not feasible, that is, to attach the stairs to the wall, makes it admissible. That is not GTW's position. That evidence is not going to be offered by GTW at trial.

This witness was asked spur of the moment and he gave his opinion. But we're not taking the position that any of the subsequent remedial measures that were taken following Mr. Faford's first incident were not feasible and do not plan

to do so at trial and will not do so at trial.

THE COURT: Mr. Wilensky?

MR. WILENSKY: Your Honor, we allege that the plaintiff was injured in the first incident in part because there was the gap in that -- between the staircase where plaintiff was standing and the adjacent wall.

You know, the testimony here was from Mr. Grandberry, who is not just plaintiff's supervisor, he is designated as an expert witness by the defendant regarding the staircase and the area where the plaintiff was hurt. And he testified under oath that he didn't think it was feasible for the staircase to be affixed to the wall, but that's exactly what happened after the fact.

Their expert supervisor contested the feasibility of this repair, and under 407 I think that that's -- that makes the subsequent remedial measure admissible.

THE COURT: Well, it all depends on what he says, doesn't it?

MR. WILENSKY: I suppose so. I think that the foundation would have to be established first, but the motion should not be granted ahead of time because that testimony is on the record. And if he testifies similarly at trial, this -- it's then contested.

THE COURT: Well, that's true.

I'm not going to permit you to offer evidence in your

case-in-chief that they fixed it afterward, after the accident occurred.

MR. WILENSKY: Okay.

THE COURT: You understand that; right?

MR. WILENSKY: I do, your Honor.

THE COURT: All right. I will permit you to offer evidence of feasibility by proving that, in fact, that repair was made and, you know, you can ask the individual on cross examination if the workplace could have been made safer by attaching the stairs to the wall. And if he says, "Yes, I think it could have," then we're done. If he says, "No, I don't think it could have," then that lays the foundation.

What I don't want you to do, however, is if he says, "Yeah, I concede the point that it could be attached," for you to impeach him with his prior deposition testimony in order to set up a feasibility argument.

MR. WILENSKY: Okay.

THE COURT: So that motion is granted in part and denied in part. It's granted to the extent that you may not offer evidence of that subsequent remedial measure in your case-in-chief for the purpose of proving negligence. It is denied subject to a proper foundation being laid to make feasibility evidence relevant in that regard.

Do you understand, Mr. Wilensky?

MR. WILENSKY: I do, your Honor.

THE COURT: Do you, Mr. Russell?

MR. RUSSELL: I do, your Honor.

THE COURT: Okay. Thank you.

Now that sort of dovetails into the next question and whether or not the defendant seeks to include -- I should say -- the defendant seeks to exclude evidence of safer alternative methods of performing the job at issue in this case.

What exactly are you trying to exclude here by this motion, Mr. Russell?

MR. RUSSELL: Well, your Honor, I think that's kind of our point here is that the plaintiffs haven't identified any safer alternative. They are not -- there has been none disclosed in discovery.

And it is, you know, the Johnson case, which is an Eastern District of Michigan case from 2008, that says that safer alternatives are not relevant. But I'm not sure what safer alternatives the plaintiffs are intending to argue here, because none have been disclosed, and they don't identify any in their response that they intend to offer.

THE COURT: The Johnson case was not an evidence case, that was a summary judgment case. Wasn't that Judge Cleland's case you're talking about?

MR. RUSSELL: Yes, your Honor.

THE COURT: All right. And that really had to do with

whether or not possible safer alternatives, unnamed, would save the plaintiff's case from summary judgment, not whether or not if there were evidence, actual evidence, nonspeculative evidence of safer alternatives that would be admissible in court or not.

MR. RUSSELL: That is correct.

THE COURT: Shouldn't I read the case that way?

MR. RUSSELL: I agree with that, your Honor, but there are numerous other decisions that are cited in our -- in our motion and brief, Stillman, the Dixon decisions, that also say proof of safer alternatives is not relevant. The question is whether the workplace was relevant on the date in question.

THE COURT: All right. Mr. Wilensky?

MR. WILENSKY: Well, your Honor, I think that this motion goes hand in hand with their Motion in Limine Number 9, the access to the newer and safer tools, and that's specifically the safer methods which are very much relevant in this case, and we certainly plan to present evidence on.

We have alleged in this case that plaintiff was not given safe tools and that the old, worn-out wrench he had to use to perform the repair in the January 2017 injury, it slipped and that was a cause of that first injury.

You know, there's testimony from multiple witnesses that other Grand Trunk employees on different shifts were given newer and safer tools and that plaintiff and his co-workers

asked for access to those tools but were denied, and those tools were kept under lock and key.

You know, that bears directly on our claims of negligence in the case and the jury is entitled to hear that evidence. We have cited -- in response to this specific portion of the motion, Number 7, we have cited numerous cases in the brief, including from the Sixth Circuit in Churchwell and Rodriguez that evidence of safer methods of work are admissible in FELA cases because the jury can't evaluate what's reasonably safe in a vacuum and evidence regarding whether safer alternatives were available absolutely bears on whether the work method at issue was actually safe at all.

And the Sixth Circuit endorsed that kind of evidence as being absolutely probative on that issue of negligence, and it is a major issue in this case. The Sixth Circuit says we can put it in, and we plan to do so, your Honor.

THE COURT: Mr. Russell, anything else?

MR. RUSSELL: Well, your Honor, yes. On the issue of newer and safer tools, there is a problem there because the plaintiff is obligated by safety rule to immediately report workplace hazards and unsafe work conditions and injuries.

And Mr. Faford reported on the day of the accident, his accident report, that his accident was not caused by any defective tools or equipment. That was a theory that somebody came up with much later. And for that reason, we don't have

the wrench or the tool that Mr. Faford was using. He told us that wasn't the cause of his injury and nobody kept it. So we don't have that tool to compare with any other tools. So it's a problem for that reason as well. But if all we're talking about is tools, maybe we can address that when -- with Number 9.

THE COURT: This Item 7 in the motions seeks to include a rather broad range of evidence, and that is, whether or not safer alternatives existed. The Churchwell case specifically says, and I'm quoting, "Proof that a safer alternative existed makes it more probable that a defendant failed to exercise reasonable care in establishing a safe workplace."

Now, Churchwell was a Jones Act case, but the principles apply equally, with equal force, in a FELA case.

There is the Rodriguez case. Judge Murphy, in our Court, denied an identical argument that Grand Trunk raised back in 2009.

It is relevant that safer alternatives existed. We will talk about that specific tool in a moment.

The Johnson case, as I mentioned before, does not support the plaintiff's argument, and the other cases that were cited primarily were -- by the defendant were from the Seventh, Fifth, and Fourth Circuits. The Fifth Circuit has spoken on this. So with respect, that aspect of the motion is denied.

Next, the defendant seeks to exclude evidence of a lack of formal investigation or discipline concerning whether the plaintiff violated any safety or operating rules.

So go ahead with that, Mr. Russell.

MR. RUSSELL: Sure, your Honor.

This motion is another example of Mr. Faford's kind of ever-changing story about how his accident happened. His tools on the day of the accident, like I just mentioned, he reported his tools were not unsafe. There is no mention of the stairs shifting. No attempting to muscle it, the bolt, that is, on the angle cock, after moderate effort was used, all things that he said in his deposition for the first time.

So under the collective bargaining agreement that governs Mr. Faford's relationship with Grand Trunk, Grand Trunk is afforded discretion as to whether or not it conducts a formal investigation once an incident occurs.

If it does nowadays, it does so at its own peril, because railroad employees who report unsafe work conditions where investigations are conducted are afforded whistleblower -- afforded whistleblower status and can sue the railroad for a whistleblower claim.

So Grand Trunk supported that discretion. It does not assess discipline in every case or for every incident, and so the evidence about whether or not a formal investigation occurred is completely irrelevant.

The case that the plaintiff cites, the Panger case, there was a formal investigation. The railroad exercised its discretion, conducted a formal investigation, which absolved the plaintiff of fault. The railroad took the position, after an investigation, the plaintiff was not at fault. And then it said that the evidence should admissible because the railroad took an inconsistent position at trial.

Here there is no position taken. GTW acted within its discretion based on the information the plaintiff reported on the day of the accident, which has changed now. He has told a different story in his deposition and has made several admissions which we believe constitute contributory negligence.

But the evidence that we did not exercise our discretion to conduct a formal investigation does not make it more or less probable that plaintiff was negligent or anything else.

And also, if they had conducted a formal investigation we contend that's a subsequent remedial measure. So we believe the evidence that there was no investigation conducted is not probative and ought to be excluded.

THE COURT: Mr. Wilensky?

MR. WILENSKY: Yes, your Honor.

I think the key point from our perspective about what Mr. Russell said is that the defendant exercised its discretion not to charge him under these circumstances.

And here at trial they plan to put on testimony and evidence that in the railroad's view the plaintiff was comparatively negligent by violating a slew of safety rules.

We think that it's extremely relevant and probative, then, that the railroad did not charge plaintiff with any rule violations or discipline him for those alleged violations that it now says that he committed.

You know, I think that the defendant's arguments, at best, are explanations for why it didn't charge him and factual disputes on those matters, and they can present those issues to the jury. It doesn't make their decision not to impose discipline any less relevant.

We do rely on the Panger case. It says that it's -- that this kind of evidence is admissible because it gives rise to an inference that the actual facts are inconsistent with what the defendant now claims at trial.

I don't think that there is anything in the Panger decision that holds that the holding of that case turned on the fact that there was an acquittal at the investigation hearing. There is nothing of that sort in that case.

And the Hval case from Oregon State Court, which we also cited in our brief, specifically held that evidence of a lack of discipline is admissible to rebut a comparative negligence charge by the defendant. You know, there's no -- all of the -- all of the issues that are identified --

THE COURT: In Hval, wasn't the evidence, Mr. Wilensky, that someone else was charged with the violation and not the plaintiff?

MR. WILENSKY: No. They disciplined Hval's co-workers and not Mr. Hval, and later on they tried to put those rule violations on Mr. Hval at the -- at trial. And the Court -- and the Court, the Appellate Court affirmed, I believe, the Trial Court's determination that the fact that he wasn't disciplined, that he wasn't disciplined by the railroad and that others were, was admissible as contradicting the railroad's claims at trial.

THE COURT: All right. Anything else, Mr. Wilensky?

MR. WILENSKY: It's very probative, in our view. I'm sorry.

THE COURT: I apologize.

Anything else, is what I was asking. Any further argument?

MR. WILENSKY: I don't think so, your Honor.

THE COURT: All right. Anything else, Mr. Russell?

MR. RUSSELL: No, your Honor. I would just mention that the things the railroad is saying that Mr. Faford did unsafe that constitutes contributory negligence were not reported to the railroad by Mr. Faford on the day of the accident. There's no way they could have investigated, so -- or charged him with a rule violation, which they didn't know

he had committed until he said so in his deposition many years later, and it was too late at that point.

THE COURT: Well, this is kind of interesting. The defendant wants to offer evidence that the plaintiff violated safety rules by not reporting the causes of his injury, also by not refusing work which he believed could be unsafe, and also by -- that is, invoking the empowerment rule, and because of that he was comparatively negligent.

Whether the defendant accused, either before or after -- - I guess after -- and disciplined Faford for violating those rules becomes relevant, and that's really what the Panger case, which was an Eighth Circuit case, stood for, in addition to the State Court case from Oregon and the Smith case that the plaintiff cited.

The undisputed fact is that Grand Trunk never did investigate or discipline Faford for any alleged violation of safety rules and that could be considered inconsistent with its responsibility and with its assertion of his responsibility and it would be admissible for that purpose.

Grand Trunk urges the Court to exclude reference about its failure to discipline Faford for three reasons, so let's look at those.

First, it contends that it does not and cannot assess discipline for every violation of its operating rules, and therefore, it is a discretionary decision not to investigate

Faford, and therefore, that discretionary decision is irrelevant.

But I find that that doesn't really stand up to the logic behind the argument. If Grand Trunk has the discretion not to investigate employees, that implies that it affirmatively chose not to investigate and discipline Faford, and that contradicts its position that he violated, in any material way, its operating rules.

Grand Trunk also maintains that the railroad -- the Railway Labor Act and the collective bargaining agreement between Grand Trunk and the plaintiff's union govern the assessment of discipline against an employee, and therefore, it suggests that the Court has, quote, "no jurisdiction," close quote, in this area and that the National Railroad Adjustment Board is the exclusive forum for dealing with that.

But nobody is challenging Grand Trunk's decision not to investigate Faford. Instead, Faford is simply arguing that the lack of invest -- of an investigation ought to be able to rebut the defendant's argument that he violated the rules.

The second point is that the post-incident personnel action is inadmissible as a subsequent remedial measure and admitting it would violate Rule 407. But that argument is off. The failure to do anything does not constitute and cannot constitute a subsequent remedial measure. In fact, the point of Rule 407 is to encourage parties to take steps in

furtherance of added safety. So the defendant cannot benefit from the rule when it failed to fulfill its own purpose.

Finally, the defendant argues that this line of argument is substantially more prejudicial than probative. I don't find that it is. There is nothing conscience shocking about the evidence of failure to discipline, and so I'm going to deny that aspect of the motion.

On to Item Number 9, and that was teed up before, and that is whether or not there is evidence that there were better tools available to Faford who was using old and worn-out tools ought to be excluded because, as I understand it, the evidentiary hook that the defendant relies on is relevance and balancing under Rule 403.

So why don't you proceed with that, Mr. Russell?

MR. RUSSELL: Thank you, your Honor.

In terms of relevance, newer and safer alternatives is not the relevant inquiry under the FELA. It's whether the tool at issue was reasonably safe and whether the workplace was reasonably safe.

This whole issue about the tools, the wrench, the wrench slipping, this all came up much, much later when -- after this lawsuit was filed. Mr. Faford reported to the railroad on the day of the accident that his tools were not defective and did not cause the incident, and so we have no way of -- that tool was not, you know, preserved as evidence

like it would if it was an object that someone was claiming caused an injury.

Mr. Faford reported, "I was using the wrench and I felt pain in my back." Didn't say anything about it slipping off the bolt or that he felt the tool was old, worn out, anything like that. And so the first time we heard about it in this lawsuit was now all of a sudden the tool is defective and that there were these other tools, again, not really identified that other shifts had that were safer.

And so not only is it not relevant, but given what the plaintiff reported, he shouldn't even be allowed to argue that the tool was defective, because what he reported, as he was obligated by the safety rules, was that the tool was not defective, and that report prejudiced the defendant. So for that reason as well we would ask it to be excluded under 403.

THE COURT: So you're arguing that because the plaintiff reported that the tool was not defective he should not now be able to argue that it was and that there were better tools available?

MR. RUSSELL: Yes, your Honor.

THE COURT: Okay. Mr. Wilensky?

MR. WILENSKY: Well, your Honor, I do think that he -- my recollection of the incident report, which admittedly I don't have in front of me right now, but I do think that he said in the incident report that his wrench slipped. I'm not

going to go back over the argument that I made a moment ago about newer and safer methods. I think the Court has already ruled on that.

The evidence -- the argument put forward by the defendant here, I think, goes to cross examination it may take of Mr. Faford. It doesn't -- it may provide a basis for cross examination. It doesn't provide a basis for exclusion. The elements for estoppel certainly aren't met here in terms of what happened before and it's not fully briefed regardless.

You know, he has -- the claim in this case is certainly that the tools that he was provided with were inadequate, they were old and worn out, and three of his co-workers have testified that this was a recurring issue that they repeatedly brought to the attention of Grand Trunk supervisors, and they were rebuffed every time.

That's very relevant evidence. It is evidence of safer alternative, which is permitted under the Sixth Circuit cases we discussed previously. And it's -- you know, it's at the crux of the plaintiff's negligence case for the first injury where we -- you know, that's the allegation, that he was provided with unsafe tools, and this goes to the heart of that.

So I don't think that the defendant has provided a basis for excluding this evidence, your Honor, and we would ask that this portion of the motion be denied.

THE COURT: All right. Anything else, Mr. Russell?

MR. RUSSELL: No, your Honor.

THE COURT: Okay. I agree, the evidence is relevant. There is no basis to estop the plaintiff from asserting that position. There is plenty of information available to the defendant for cross examination and to provide an explanation; in fact, a rather stark explanation to the jury as to why that tool isn't available for them to evaluate on their own, but that all goes to weight and not admissibility.

Item Number 10 has to do with excluding testimony that the plaintiff's preexisting back injuries were caused by any duties that Grand Trunk imposed upon Faford before the two incidents in this case, and I thought we had crossed this bridge earlier before that the defendant did not -- I'm sorry -- the plaintiff did not intend to make any argument to that effect.

In fact, I think the plaintiff's position is that there was no preexisting injury to be aggravated to begin with. So I'm not sure -- well, maybe out of an abundance of caution, that's why the defendant offered that, but is that pretty much your position on that, Mr. Russell?

MR. RUSSELL: Yes, your Honor. And my understanding was this item was conceded by the plaintiff.

THE COURT: Yeah, I think so too, Mr. Wilensky. Do you agree?

MR. WILENSKY: Your Honor, we are not going to argue that the defendant was responsible for plaintiff's physical condition before the first injury alleged.

THE COURT: All right. I'm going to grant the motion. If something should come up that somehow changes that position then the defendant -- the plaintiff must seek permission of the Court to address something along these lines before it does so and must seek that permission outside the jury's presence.

Item Number 10 has to do with testimony about Barry Hammock's conduct after Faford reported the January injury, and I'm not sure the basis.

Is it relevance that you're arguing on this, Mr. Russell?

MR. RUSSELL: Yes, your Honor. There's several bases here, but relevance is the main thing; that, you know, there is no claim in this case that Mr. Faford did not receive proper medical attention or that his injuries were somehow worsened by some late reporting.

But the main thing is, your Honor, this is going to create an irrelevant sideshow, a trial within this trial about this long history with Mr. Hammock.

Mr. Hammock used to be a car inspector with Mr. Faford and his three co-workers who are expected to testify at trial, and there was no supervisor for the midnight shift, which is the shift that they regularly worked.

Others, including some of Mr. Faford's co-workers, interviewed for this job. Ultimately, Mr. Hammock was selected and became the supervisor. Before that, Mr. Faford was the senior car inspector in the Flat Rock shop and he was the one that was tasked with the supervisory responsibilities, informing the men of their work duties, holding the job safety briefing. And I think there was some bad blood there when Mr. Hammock got this job.

And what happened in this case, your Honor, is when the co-workers, Mr. Johnson, Mr. Sennett and Mr. Schurig were deposed, and Mr. Faford, they all launched into this attack on Mr. Faford -- I mean -- on Mr. Hammock, because he allegedly -- when Mr. Faford reported his first incident, they claim he laughed him off and walked away.

Now, Mr. Hammock, who has also been deposed, disputes that. And there was a subsequent investigation of Mr. Hammock. He was ultimately exonerated by the company and found that he did nothing wrong. But they claim he was walked off the property and subsequently fired from his position as a management employee.

And all of this has nothing to do with Mr. Faford's incident. It's going to require us to call additional witnesses. We will have to call Brian Willis, who was Mr. Hammock's supervisor, to explain that he was exonerated. It's going to -- and so it's just a complete sideshow and it's

an attempt to -- for the plaintiff to pick out a villain for the railroad that they can come in and demonize for irrelevant conduct that had nothing to do with this incident, so they can try to make the jury mad at the railroad because Mr. Hammock did something, you know, egregious like laughing in someone's face when they reported an injury, and that has no relevance.

To the extent that there was a subsequent investigation of Mr. Hammock, it's a subsequent remedial measure. And then if they are trying to say that Mr. Hammock was a bad supervisor and did bad things before this accident, had certain personality traits, that's improper character evidence.

So for all those reasons, this evidence about Mr. Hammock, this post-incident conduct, is irrelevant and ought to be excluded.

THE COURT: Well, looking at your motion and hearing your argument, I'm hearing some attempts to broaden the category of evidence you want to exclude, and what I mean is, it sounds as if first you're focusing on whether or not the evidence of Hammond's conduct on the day of the accident should be excluded, but then I hear that you're saying that evidence about Hammond getting -- or Hammock getting walked off the job, that there was disciplinary proceedings that ended up in his favor and so forth, should be excluded as well.

Are you talking about everything there? Because I'm

not sure that the plaintiff intends to offer any evidence of the latter category.

MR. RUSSELL: Well, I just want to be clear about that, because they have elicited that testimony from co-workers. Mr. Faford has testified to it in his deposition. The fact that Mr. Faford -- I mean, Mr. Hammock, whether or not he got walked off the property -- which he didn't, by the way -- is completely irrelevant to Mr. Faford.

THE COURT: Okay. Mr. Russell, what did the plaintiff tell you that he intended to offer?

MR. RUSSELL: Well, he intends to offer that he, first of all, reported the incident; that Mr. Hammock laughed him off and walked away. They have said in their pleadings that this is all relevant to Mr. Hammock's overall character.

THE COURT: No, no, no. Forget the pleadings. You had a pre-motion conference, I presume, because you represented you did, in which you discussed the nature of the motion and the evidence that you wanted to exclude.

What did he tell you he was going to offer?

MR. RUSSELL: Well, the evidence that Mr. Hammock laughed him off and walked away.

THE COURT: That's it?

MR. RUSSELL: Yes. And then also -- although, also, that he was subsequently investigated and walked off the property.

THE COURT: Oh, okay.

MR. RUSSELL: I think they're going to offer all those.

THE COURT: So you believe the plaintiff is going to offer all of that, then?

MR. RUSSELL: I think so.

THE COURT: All right. Mr. Wilensky?

MR. WILENSKY: I think we are, your Honor, to be clear. And you know, your Honor, Mr. Russell's argument, he chalks this up to a vendetta on the part of plaintiff and his co-workers against Mr. Hammock. And, you know, to that end, we think that Mr. Hammock is just a bad supervisor, and inadequate supervision is one of our claims of negligence in the complaint in this case.

The railroad claims that Mr. Faford failed to properly report his injury in this case and that his -- you know, any failure in that regard casts doubt on whether he was actually injured.

In light of that claim by the railroad, the testimony about -- from Mr. Faford and from his co-workers, which we have cited in the brief, that testimony about when he tried to -- when Mr. Faford tried to report his injury to Mr. Hammock, he was ignored and then he was laughed at, it's absolutely relevant because it shows, first, that he tried to report his injury; and second, it provides an explanation for any

deficiencies in the report because he was ignored and then blown off, essentially, under egregious circumstances by his supervisor.

THE COURT: Yeah, but what about any subsequent action by the railroad against Hammock?

MR. WILENSKY: Well, I think that that's -- I think that that goes hand in hand about what we talked about earlier in terms of the investigation. You know, the defendant --

THE COURT: What investigation?

MR. WILENSKY: The investigation -- the part of the motion that we discussed a little bit earlier about how Mr. Faford was never investigated or was never disciplined as a result of this. This is the other side of the same coin, I think, your Honor.

The defendant, in Mr. Hammock's deposition -- and they noticed and took his deposition in this case, this was not our dep, so it was on direct on their part, they -- they took testimony of him that -- where, you know, he said that he did everything by the book; that he offered the plaintiff medical care or anything else that he needed as a -- you know, after he was injured here, and that's absolutely rebutted.

The subsequent treatment of -- and the fact that Mr. Hammock was walked off the property, as confirmed by Mr. Faford's co-workers, regardless of what the railroad now claims, that's relevant to rebut his testimony that he did

everything by the book and he offered plaintiff medical care and did this the right way.

And it's also relevant to the claim of negligent supervision that his -- that the plaintiff's supervisor was taken off the property as a result of this exact incident, and the fact that he was then demoted from the supervisory ranks back down to the rank and file.

All of that is relevant, your Honor. Again, I think that what the defendant has offered here are a number of, you know, alternate arguments that it can make at trial to try and minimize the weight of this evidence, but I don't think that that affects its admissibility.

THE COURT: Mr. Russell?

MR. RUSSELL: Well, your Honor, I think Mr. Wilensky just confirmed that this -- that they do intend to offer that Mr. Faford -- I mean, excuse me -- Mr. Hammock was a -- what he described as a bad supervisor and must have acted in conformity therewith on the day of the accident. That is classic character evidence.

The evidence of the subsequent investigation to which -- which exonerated Mr. Hammock has no relevancy. And to the extent it does, it's a subsequent remedial measure. And the only way it would be relevant if, in fact, Mr. Hammock --

THE COURT: Tell me how it's a subsequent remedial measure if he was investigated and exonerated. I mean, I could

see how it would be a subsequent remedial measure if he was investigated and fired.

MR. RUSSELL: Our position is, the subsequent investigation is a remedial measure that the railroad can undertake and evidence of it should not be allowed. I understand that he was not fired or anything like that, but the investigation itself.

And, of course, it has no relevance to the incident. And the only way this could be relevant is if Mr. Faford -- there's some FELA cases where a railroad employee alleges he did not receive prompt medical treatment, like, for instance, he reported chest pain and laughed him off and later had a heart attack, that might be relevant. But here, none of this has any relevancy. It's -- like I said, it's going to create a sideshow, a trial within a trial, and none of it has any relevance to the issues in the case.

THE COURT: The evidence, as I see it, of plaintiff's reporting the injury and Hammock's reaction to it on the date of the event is relevant to show that Mr. Faford was injured at the time, that he attempted to report his injury as required by Grand Trunk's rules, work rules, and that potentially Grand Trunk provided negligent supervision based upon Hammock's conduct.

Anything that happened afterward, that Hammock was walked off the property, that there was a subsequent

investigation, that Hammock was exonerated, I don't see that that has any bearing to show that a fact of consequence to the determination of this action was more or less likely, and it is collateral to the issues in the case.

So I'm going to deny the motion with respect to exclusion of evidence of Hammock's conduct on the day of the incidents -- incident in relation to the plaintiff and his reporting and grant the motion concerning subsequent items of evidence that I just mentioned.

Item Number 12 has to do with any reference to Grand Trunk as the Canadian National Railway, and for the life of me I can't figure out what the problem is with that. There are several witnesses and documents that refer to CN as the defendant's parent company. I don't see how that would provide any confusion. It would probably provide clarity. And I don't see any prejudice that could result from identifying Grand Trunk as a subsidiary of a Canadian company.

Mr. Russell, what's the problem here?

MR. RUSSELL: Well, your Honor, the problem here is that, first of all, Canadian National Railway is a separate entity who is not a party to the action.

The defendant is Grand Trunk Western who does business under a logo, CN, as does a number of -- as do a number of other railroads in the United States that are also subsidiaries of the parent company, Canadian National Railway.

But my concern here is that, you know, the plaintiff is going to say, well, this isn't really Grand Trunk, this is the big bad foreign Canadian Railroad, Canadian National Railway, and that's just not true. That is the parent company.

The defendant in this case is Grand Trunk. I'm concerned about an argument of that nature. And quite frankly, it's not relevant. Canadian National Railway is not a party. The fact that CN appears on -- Canadian National appears on certain documents in the case should not allow the plaintiff to refer to the defendant as Canadian National Railway.

And I usually handle this in opening statement. I explain to the jury that my client is Grand Trunk Western. Sometimes you see the logo, it's a logo, Canadian National, that's a logo they do business under, but don't get confused.

But the fact of Canadian National Railway, a separate parent entity, I don't think is relevant and the potential for prejudice is there if the plaintiff makes that argument.

THE COURT: Have you tried Grand Trunk cases here in this District before?

MR. RUSSELL: Not yet, your Honor. This will probably be my first one.

THE COURT: Okay. Mr. Wilensky, do you have any argument?

MR. WILENSKY: Your Honor, I just think that based on the unprompted deposition testimony of the three witnesses that

we cited, this is relevant because it's what it is known by as -- known by by its employees and anecdotally by the public. I don't think that any prejudice has been shown. And quite honestly, living in this area for a long time, I don't think that there's any prejudice against Canada in general. So I think --

THE COURT: Well, you know, I was about to make that observation, that I could see if the plaintiff filed this motion there might be something to it, because people in Michigan, especially southeast Michigan, love Canadians. I think the feeling is mutual. There is so much pre-pandemic reciprocal trade and travel that the people of Windsor and Canada are thought almost to be pseudo-citizens of the country. I don't see any prejudice and I don't see any confusion.

I will step in, of course, if the plaintiff makes an argument about the resources of Canadian National Railway or that that position has anything to do with liability in the case, but other than that, the notion is denied.

The next point is that the defendant seeks to preclude evidence about loss of consortium or injury suffered by family. I think that point is conceded. I don't think the plaintiff intends to offer any evidence in that regard. We have talked about it before.

Mr. Wilensky, are we clear on this point?

MR. WILENSKY: Correct, your Honor.

THE COURT: Okay. That aspect of the motion is granted.

Item 15 has to do with item -- evidence that Brian Weaver was not able to investigate the scene of the accident, when he apparently did his investigation based upon facsimiles or specimens that were similar in all material respects to the railroad car in issue.

I don't think the plaintiff intends to make a point of that; is that correct, Mr. Wilensky?

MR. WILENSKY: Correct, your Honor.

THE COURT: All right. That part of the motion is granted.

Next has to do with any argument or evidence that the plaintiff's job tasks were tiring, exhausting, repetitive or strenuous because, as I understand it, the defendant makes the point that this is not a repetitive work injury or cumulative trauma-type claim.

I'm not sure why that means that evidence should not be admissible, though, Mr. Russell. Can you explain that, please?

MR. RUSSELL: Sure, your Honor.

My concern is if this evidence is allowed and it's not a cumulative trauma claim, but the jury might infer that the plaintiff's back in the condition that it was on the day of the accident -- and keep in mind our position is that, you know,

he had these preexisting injuries -- was due to, you know, strenuous and repetitive job tasks, and which is contrary to what the plaintiff's interrogatory answers say in this case.

THE COURT: Yeah, but why should that mean that the plaintiff can't tell the jury what his job consisted of?

MR. RUSSELL: Well, if it -- my concern is, if they are going to make the argument that the job was tiring or strenuous, it bleeds over into the realm of cumulative trauma, which is not at issue in this case.

THE COURT: Well, wouldn't that explain why he can't return to work?

MR. RUSSELL: It could, but the -- you know, it's got to be specifically tied to specific job tasks that he can't perform, specific job functions, like he has a 15-pound lifting restriction that prevents him from coming back.

THE COURT: All right. I --

MR. RUSSELL: But any argument --

THE COURT: I'm sorry, go ahead.

MR. RUSSELL: I'm done, your Honor.

THE COURT: I see your point, Mr. Russell. I'm -- I don't believe that the argument supports excluding this evidence. If the plaintiff attempts to change theories to allege a cumulative trauma or repetitive work injury, of course, I will prevent the plaintiff from doing that. Other than that, though, that aspect of the motion is denied.

We have, let's see, four other motions, I think each addressing discrete items of evidence.

Before we get to those, Rene, do you want a break or are you okay?

(Discussion held off the record.)

THE COURT: All right. We will continue then.

The next is Item 112 having to do with the golden rule argument, or, as the defendant identifies it, the reptile theory argument, which is interesting.

I have to confess I am quite familiar with the golden rule argument. I am not familiar with the reptile theory, but I have been educated by the defendant's motion here. And we -- I can assuredly -- I can assure all of you that there will be no dinosaurs, lizards, or snakes allowed in the courtroom or any references to them, particularly snakes.

But the golden rule argument is precluded. I don't think that the plaintiff intends to offer that argument at all. To that extent, the motion is granted.

I'm not sure about what you want to say about the reptile theory, Mr. Russell, but go ahead with that, please.

MR. RUSSELL: Sure, your Honor.

THE COURT: Just make sure -- just make sure it's not a cold-blooded argument.

MR. RUSSELL: I won't, your Honor.

As you picked up in our briefing, your Honor, the

reptile theory is something that's -- you know, we're seeing more and more of these days, and it's an alternate version of the golden rule argument. And --

THE COURT: Is this this conscience of the community type thing that you're worried about?

MR. RUSSELL: Yes. Yes, your Honor. That's on page 4 of the plaintiff's brief. They specifically say the jury is entitled to consider whether a litigant needlessly endangered the public.

And what happens is, the juror hears that evidence and says, well, I'm a member of the public, you know. And it's just another way -- I'm a member of the community. I don't want to be needlessly endangered. And whether or not Grand Trunk's conduct needlessly endangered the public is completely irrelevant, and any questions along that line or invoking exactly what we're trying to prevent, is the jury putting themselves in the plaintiff's position.

And so that -- that's -- that's what this motion is about. I think your Honor has -- you know, understands it well.

THE COURT: Well enough, I guess.

Mr. Wilensky?

MR. PEARLMAN: Your Honor, excuse me. I have got Number 2, 4, and 5.

THE COURT: Oh, I'm sorry, Mr. Pearlman. Go ahead

with that.

MR. PEARLMAN: Well, first of all, yes, I don't think there is a question regarding the golden rule.

Second of all, I promise I won't call the railroad a reptile. I don't know much about the reptile theory, so I am not sure what Mr. Russell wants me not to say. I thought in reading his reply that basically we would take that up during the trial if I overstep my bounds. But I don't think this is an issue -- going to be an issue.

THE COURT: Well, let me just address this, Mr. Pearlman.

Mr. Russell, I appreciate the thought behind this motion as sensitizing the Court to the argument, and it serves useful purpose in that regard. I think that what you're trying to prevent preemptively here is a little bit too vague for me to give you an argument about it.

I'm going to deny the motion without prejudice and leave it to contemporaneous objections. You have briefed it, I understand your position, and I think it's more prudent to raise it in that regard, with all due respect.

MR. RUSSELL: Thank you, your Honor.

MR. PEARLMAN: Thank you, your Honor. Mr. Wilensky --

THE COURT: Next is -- I'm sorry?

MR. PEARLMAN: Mr. Wilensky will do the third one and I'll do four and five, Judge.

THE COURT: This is Docket Number 113. It has to do with the defendant's argument about precluding evidence primarily, I think, from the plaintiff's expert concerning the calculation of damages. The calculation of damages usually follows a four-step process, but damages, strictly speaking, I guess, broadly speaking, concerning lost wages are not limited to mere wage loss but rather loss of earning capacity. I don't think there is a dispute about that.

The four-step process, however, calls for -- step two, in any event, calls for calculation of a lost income stream, and the loss of wages is a pertinent measure of the loss of income stream, and so that's why, I guess, wage loss is important and evidence bearing on that is important, but the estimated loss of work life, the calculation of the lost income stream, the computation of total lost income, and then a discount to present value is the four-step process identified by the parties here.

And so I think the argument really sort of gets into the weeds about how wage loss -- the wage loss component should be calculated. So I'll let you take it from there, Mr. Russell, if you please.

MR. RUSSELL: I believe Ms. O'Donnell is handling this one.

THE COURT: Oh, okay. Ms. O'Donnell.

MR. RUSSELL: And I'll mute.

MS. O'DONNELL: Thank you, your Honor. Thank you, Mr. Russell.

Yes, your Honor. As you pointed out in your introductory remarks, it's a four-step process, as we set forth in our motion citing to the Culver case out of the Fifth Circuit.

And the difficulty here is that the plaintiff mixes up loss of earning capacity and the loss of wages. The point is that the starting point of the four steps is to determine the base annual income at the time of the injury, and that's based on United States Supreme Court case of J&L.

But here, plaintiff's second alleged injury is 8/3/18; the first is 1/3/17. He did not have a full year in either '17 or '18; so, therefore, we need to annualize his earnings.

Plaintiff, on the other hand, wants to use a method that's not been adopted by any court, and that is the use of cohorts. But as I said, it's not allowed by any precedent, and we have information as to Mr. Faford's income for his last complete year from which we can annualize his earnings.

And then, secondly, as to the second step, the Supreme Court said in Liepelt, we must use after-tax income. It's the only realistic measure.

Similarly, the Supreme Court said the same in the J&L case; therefore, the measure of damages in this FELA case is lost income after deducting for federal and state taxes and

Tier 1 and Tier 2 RRTA taxes.

So, therefore, Mr. -- Dr. Thomson, his report has got some errors in it with regard to these steps.

Now, the plaintiff cites to the cohorts, which is not allowed under any precedent. And they cite to this Taenzler case, which is misplaced because they talk about future trends. And Dr. Thomson has no basis for the -- comparing Mr. Faford with cohorts because he can't differentiate between them. There is not enough information.

And the plaintiff says, well, this whole calculation of the tier -- deducting for Tier 1 and Tier 2 RRTA taxes is too complex.

To the contrary, the United States Supreme Court said in Liepelt, a jury can compute this. It is not too complex. So to address the concern that Mr. -- the plaintiff raised about double taxation, this can be addressed by the jury with a proper instruction. The economists and the jurors must deduct RRTA taxes above the wage caps when calculating lost wages.

Then we get into the last corollary of the four steps, which is unreimbursed business expenses. When calculating lost wages, Mr. Faford's lost wages, based on Mr. Faford, not on others, his economist must deduct from his income stream business expenses he would have incurred were he still at the railroad; e.g., safety shoes, union dues, and share of health insurance, if any.

So Dr. Thomson, we had his deposition scheduled for April 20th; however, I just got an email on Friday from Mr. Wilensky telling me that Dr. Thomson's deposition cannot go forward on the 20th.

Many of these issues, your Honor, we will flesh out at his deposition, but according to Mr. Wilensky's Friday email, we cannot take his deposition until the end of April or the beginning of May.

As far as the component regarding loss of fringe benefits, plaintiff is totally wrong in his response about plaintiff being off insurance as of 2022, and Dr. Thomson made that same error in his report. Mr. Faford is still an employee. And on the one hand, Dr. Thomson says he is going to go off in 2022 and on the other hand he says he is still going to be on. As I said, we will have to flesh that out in his deposition when that occurs.

But the point is, his calculation must reflect the reality that Mr. Faford has been covered for health insurance for 2017, 2018, 2019, 2020, and 2021, et cetera.

And then last, mitigation. Dr. Thomson -- and again, this is something we'll take up at his deposition -- Dr. Thomson stayed at the number of 30,000, which is the number that Mr. Faford is currently making. I'll find out at his deposition, apparently he was not told that the plaintiff's supervisor said the plaintiff could earn more at his new job

than he did at the railroad.

Mr. Faford has a co-worker who has been there only two years who is already making twice what Mr. Faford is currently making. A second employee is making six figures. And the supervisor said if Mr. Faford works hard and is motivated, he can make six figures. Dr. Thomson did not take that into account.

Again, these are issues we will raise at the deposition and will be more extant, if you will, after we have taken the dep and see if Dr. Thomson backs off some of these errors regarding the RR -- the Railroad Retirement Tier 1 and Tier 2 taxes, if he backs off the cohort, and if he backs off his mitigation calculation.

And so, your Honor, I ask that until we depose Dr. Thomson and we see where he stands, we already know that as far as our Motion in Limine Number 5 regarding loss of household services that another court has stricken his opinion in that regard as being lacking in -- totally lacking in foundation, so we will have to see whether any other of Dr. Thomson's other opinions, when fleshed out at his deposition, are also lacking in foundation, as I believe the cohort analysis is.

So, your Honor, I ask that at this point we hold this motion in abeyance until we're permitted to take Dr. Thomson's dep, which the dates keep getting pushed back.

Thank you, your Honor, for hearing me out.

THE COURT: So you don't want a ruling on this now?

MS. O'DONNELL: I think it -- I think it's premature at this point, your Honor. If you have any insight based on your research and the parties' briefs, I think that could be helpful to the parties while deposing Dr. Thomson. So I'm very open to hearing what, if any, insight you have on these issues.

THE COURT: If I were to rule on this now, what do you want excluded, his whole opinion?

MS. O'DONNELL: Well, that would be interesting.

THE COURT: Well, I'm trying to read that into your motion. I'm not sure exactly what it is you want excluded based on the motion that you have presented.

MS. O'DONNELL: Well, he has to deal with the Railroad Retirement Tier 1 and Tier 2 taxes properly, and so far he hasn't done that properly.

Secondly, his use of cohorts is without precedent.

His loss of fringe benefit calculation is incorrect, and is both incorrect and inconsistent, totally inconsistent, and his mitigation is boneheaded and not based on the testimony we obtained from his supervisor.

So frankly, frankly, given the fact that his opinions are not based on facts, I think all of his opinions should be stricken. They are inconsistent, they are unsupported, and just like in the case that we cited in our fifth motion in

limine, his opinion should be stricken.

THE COURT: All right. Based upon what I have heard, I don't think it's prudent to rule on the motion at this point. And the tenor of the motion really is not a motion in limine at all. It sounds like it's a Daubert motion, which really is not an issue; that is, the admissibility of the expert opinion under Rule 702 is not a proper issue to be raised via a motion in limine.

I think probably the most prudent thing to do under the circumstances, then, is to deny the motion without prejudice, and if you think that there is a basis to renew this motion or file a different one, if it's within the confines of the scheduling order after you take the witness's deposition, that's the route you should take.

So Docket Number 115 -- I'm sorry -- 113 is denied without prejudice.

The next motion is Docket Number 114, which is a motion to exclude -- no, I'm sorry -- it's a motion with respect to the consequences of the plaintiff's failure to make certain disclosures about his medical treatment when he worked at Ford Motor Company, and it appears that the defendant is asking the Court to make certain fact findings about the fact that Faford had a preexisting back injury while he was working at Ford or incurred there; that all of Faford's injuries are attributable to his previous existing condition, and

instructing the jury with respect to certain information concerning his previous injuries and treatment, precluding him from offering evidence that he sustained an aggravation of a preexisting condition, although that's not really on the table anymore anyway, and precluding him offering any rebuttal evidence. I think that's really what this motion seeks to do.

Who -- which one of you is taking this argument?

MS. O'DONNELL: I believe Mr. Pearlman said he is arguing the fourth.

THE COURT: No, no, this is a defense motion. Which --

MS. O'DONNELL: Yes, I know, your Honor. I'm arguing it on behalf of the defendant.

THE COURT: That's what I'm asking. So go ahead.

MS. O'DONNELL: All right, your Honor.

We are asking, based on your order compelling plaintiff to cooperate in discovery and based on his gross and flagrant violation of that order that the Court advise the jury, not as a fact finding, I think your Honor errs there, we're not asking for a fact finding, rather, a direction that it's accepted as fact that plaintiff had preexisting back injuries, conditions, disorders, or syndromes.

THE COURT: How's that different than a fact finding?

MS. O'DONNELL: No, your Honor, because it is an established fact. It's like directing the jury that the sun

comes up in the morning. You direct the jury that he had a series of back injuries prior to coming to the railroad.

And that as the second point in our motion, that you direct the jury that if it be accepted as fact that these alleged injuries are attributable to his preexisting conditions in an amount to be determined by the jury.

In other words, ladies and gentlemen of the jury, it's a fact that he had these preexisting injuries. He is claiming he injured his back in this case. We're asking you to determine what percentage is due to preexisting injuries.

Third, instruct the jury that plaintiff failed to comply with this Court's order that he disclose his medical treaters dating back to 1995; that he failed to comply with a court order by serving a verified list of treaters that didn't include the medical treatment that he received while working at Ford.

Tell the jury that plaintiff served a false answer to Grand Trunk's Interrogatory Number 4 by failing to disclose the prior medical treatment he received for his back at Ford.

And last, your Honor, direct the jury -- instruct the jury, that plaintiff lied under oath at his deposition when he testified that he never sustained any workplace injuries to his back.

Then we ask that plaintiff be precluded from offering any evidence that what happened to him at work aggravated his

preexisting conditions because --

THE COURT: That's not even on the table anymore, Ms. O'Donnell. They don't intend to make that argument.

MS. O'DONNELL: Well, I heard you say that, your Honor, that it's not on the table. I have not heard Mr. Pearlman or Mr. Wilensky say that they are not going to make that argument.

THE COURT: Well then you haven't been listening.

MS. O'DONNELL: All right. Well, could we get that on the record from one of the attorneys?

THE COURT: I think it already is.

Any further argument?

MS. O'DONNELL: Yes, your Honor.

We want to preclude the plaintiff from offering any evidence as to Items 1 through 4 in our motion and from offering any reason or excuse for why he failed to comply with your Honor's order.

And then last, to preclude plaintiff from arguing that he was an egg-shell plaintiff or a thin-skulled plaintiff, as those terms have been defined in the law.

In other words, you can't be an egg-shell plaintiff if there are no eggs. And here, since he failed to disclose his preexisting condition, he can't be an egg-shell plaintiff. So we ask the Court to preclude plaintiff from arguing that. And I don't know, and perhaps I wasn't listening, whether that's

off the table.

But we do know that point 5 of our Motion in Limine Number 4 that plaintiff claims, "Oh, the reason why I didn't comply with the court order by telling Grand Trunk about all my prior treatment while I was at Ford for ten years, a dozen injuries to his back, the reason why I didn't do that is because it was minor, and the reason I didn't do that is because I just went to my cupboard. It's like going into my cupboard and take an aspirin. These were just nurses."

Well, your Honor's order says that -- compelled plaintiff to produce a sworn list of his lifetime medical providers, and in that order you said, your Honor, the plaintiff was to furnish to counsel for the defendant, under oath, a list of all medical providers with whom he has consulted in any way from 1995 through the present day.

Plaintiff wholly failed to identify any of the medical providers with whom he consulted in any way. It's shocking to me. It's sickening to me. You have an order from a federal judge that tells you to tell the other side who you have treated with, consulted in any way. Your Honor's language was very broad and yet specific, "consulted."

If you look at Exhibit 3, your Honor, and I augmented it this morning -- and I apologize, I augmented it this morning with records that were inadvertently not included in the initial filing back in March.

But Exhibit 3, Page ID 2172, 8/31/06, that's the date, August 31, 2006, a doctor said that he, Mr. Faford, could return to work after having muscle spasm and strain. A doctor told him that. Mr. Faford didn't tell us about that.

10/22/04, Page ID 2173, a doctor notes that plaintiff's last day of work was 10/08/04 and he couldn't go back to work until 10/25/04. What is that? That's two weeks off of work. Why? For a sprain in his neck, back, shoulder, and wrist.

And yet Mr. Faford says, "Oh, these were such minor aches and pain, I don't think I missed any time from work." Well, look at 2173.

THE COURT: Ms. O'Donnell, you're getting pretty far off your five-minute mark here. Why don't you sum up, please?

MS. O'DONNELL: Thank you, your Honor. I appreciate the warning.

The point is, the plaintiff's excuse that they were minor, that there was no diagnoses, that, "Oh, they were just nurses," as if nurses aren't medical personnel who were consulted is really a disgusting failure to comply with a federal court order.

This case and this status does rise to the level of where this case could be dismissed with prejudice for the failure to deny. The plaintiff says, "Oh, well, there's -- it's a no harm, no foul, because you got all the records,

Grand Trunk."

Well, yeah, we got all the records because after writing to Ford three times, we then had to subpoena Ford, we finally got the records. But Rule 37 has no requirement for prejudice.

But then perhaps the cherry on the top of this disgusting concoction is plaintiff, at his deposition, even though we, of course, produced all these records to plaintiff counsel who presumably shared them -- and that's Exhibit 7, Page ID 2193, where there is an email from Wise Carter to plaintiff giving them all the Ford Motor Company records -- even though plaintiff had those records, and then at his deposition he was asked: "Other than your neck and midback have you ever sustained any workplace injury to your lower back?"

"No," plaintiff testified.

Under oath, lied, page 2196, Page ID.

Your Honor, this case should be dismissed with prejudice; however, we're asking for the less drastic sanction as outlined in our motion, to tell the jury he had these preexisting injuries, let them determine in what amount.

Tell the jury that he failed to comply by telling Grand Trunk about this, and he gave a false answer in his -- to Number 4, and then lied at his deposition when he said he never sustained any workplace injury to his back.

THE COURT: All right. Thank you, Ms. O'Donnell.

Mr. Pearlman, are you taking this argument?

You're muted, Mr. Pearlman.

MR. PEARLMAN: I apologize.

THE COURT: All right. This is an argument -- I'm sorry -- a motion based on Rule 37 that the Court ought to impose sanctions short of dismissal for your client's failure to comply with an order to produce. Go ahead and address that argument, please.

MR. PEARLMAN: Yes, your Honor. I understand the rule that this motion is brought under. I think that the remedy that the defendant is asking for is drastic. I think that Mr. Faford at all times, in good faith, attempted to respond to the Court's order, furnish as many medical providers as he could remember.

He did, in fact, file an affidavit which was five pages which went back, pursuant to your direction, to 1999. The issue I -- as I see it, it's that we're centering on the Ford Motor Company records, and not 12, as Ms. O'Donnell stated, but there are 10 events, not all of them are related to the back, asking Mr. Faford to remember that in 1996 he went to first aid, got an aspirin or an Ibuprofen for pain in his back and went back to work.

Mr. Faford just did not remember those events as being medical treatment, as being injuries; however, the defense has

made it very clear that they think that this is an intentional act on Mr. Faford's part to deceive the railroad, which doesn't make a lot of sense inasmuch as he advised them that he worked at Ford Motor Company. He signed an authorization for them to get the Ford Motor Company records. The Ford Motor Company records were obtained by the railroad, in an email to us, I think, on February 4 or 5, 2020. He was deposed on July 15, July 16, 2020. They had those records for five months.

If you look at the plaintiff's efforts over the course of this lawsuit, he has given them everything they have asked. He has given them photographs, credit records, financial records, medical records. He has signed every authorization that they have requested.

There is no intent on Mr. Faford's part to deceive. If he didn't remember those events from Ford Motor Company -- by the way, he did recall the shoulder incident that Ms. O'Donnell talked about which happened to be an off-duty injury playing with his kids.

So we think that the remedy asked for is so extreme that there is not, in our opinion, any intent to deceive. If he wanted to deceive, Ford Motor Company might not -- never have been mentioned by him. An authorization to get those records would never be forthcoming.

And the defendant takes the position that he believed that he would give those records up in the way he did, but that

the railroad wouldn't see those records or see those visits to the first aid.

Keep in mind also, Judge, that from 2007 until 2017, Mr. Faford had no problems with his back, no medical treatment, no indication that he was having any problems working. He worked several jobs before he went to work at the railroad. He worked at the railroad from 2010 until 2017.

So specifically the relief that the railroad is asking for in 1, 2, 3, 4, 5, and 6 of their motion, we believe, should be denied. These are fact questions. To tell the jury that he had a preexisting back injury based on those records at Ford Motor Company is a stretch. The fact that some nurse made an entry of a back pain, and again, there is -- Mr. Faford -- and our position is that there was no preexisting injury.

Although I would like to clarify, Judge, after January 13, 2017, we have never -- the issue that the Court ruled on regarding preexisting injuries were prior to the January 3rd, 2017, accident. There may be testimony that there was an aggravation of that injury on the January 3rd, 2017, injury, but nothing prior to that, because our position is, when he got hurt in January of 2017, he had no preexisting condition.

THE COURT: You mean to say that you intend to argue that the August 2018 injury when he rolled his ankle might have aggravated his back injury from January?

MR. PEARLMAN: Our expert may make reference to that, yes, sir.

THE COURT: Will he or not?

MR. PEARLMAN: Well, you know what, I'm trying to remember.

THE COURT: It's either your position in the case that he had a back injury caused by the employer's negligence back in January of 2017 and that a subsequent event in August of 2018 caused it to get worse or -- I mean, there is either testimony on that or not. Your client really should have been able to explain that by now.

MR. PEARLMAN: Well, the client --

THE COURT: Shouldn't be a mystery in the case.

MR. PEARLMAN: Oh, I'm sorry, Judge. Are you done? I don't want to cut you off.

Mr. Faford testified that he went back to work after the January incident and he was doing well and that the August accident, his back never got better.

Dr. Newman -- you got me -- I need to confer with Mr. Wilensky on this.

MR. WILENSKY: May I?

MR. PEARLMAN: Can he jump in?

THE COURT: Mr. Wilensky, what's the defendant's -- the plaintiff's position on that?

MR. WILENSKY: Yes, your Honor. Dr. Newman, who is

our neurology -- neurology expert on this and is going to be testifying for the plaintiff, he did testify that he had work-related injuries beginning on January 3, 2017, and additional injuries aggravating that which occurred in August 2018, and that's stated in his report of May 19 of last year. So that is certainly part of the case.

THE COURT: All right. But it's not part of --

MR. WILENSKY: The application of --

THE COURT: But it's not part of the case that he is an eggshell-skull plaintiff and you're not going to argue that the railroad has to take him as they find him; right?

MR. WILENSKY: Well --

MR. PEARLMAN: Okay, Ben, I'll jump in.

MR. WILENSKY: Okay.

MR. PEARLMAN: Judge, I think that that is a legitimate position for the plaintiff to take, that the railroad takes the plaintiff as he finds him.

THE COURT: Well, that's the law, Mr. Pearlman, but that depends on how you're going to make that argument. If you're going to say that he is vulnerable because he had this history of back problems which he didn't disclose to begin with, I don't know that that's something that is fair game here.

MR. PEARLMAN: Well, we're not taking the position that the back events that happened in the '90s and in the early

2000s are what was aggravated. We don't take that position that those were back injuries. Those were events, and we will deal with that as it comes.

We are taking the position that when he got hurt in January and returned, and Dr. Newman has made it clear, that the second injury was an aggravation of maybe what was already there from January, not from 1996.

We're not going to argue an eggshell. I'm not -- you're not going to hear that come from us, all right? But you will hear Dr. Newman's testimony that the second incident of August is an aggravation of that injury, that original injury.

THE COURT: Yeah. All right. Anything else on your argument, Mr. Pearlman?

MR. PEARLMAN: Yeah. I just -- you know, I urge the Court, Mr. Faford has done everything he can to comply. He is not -- if his memory is not good, it is not a reflection on his intention to disobey this Court's order. I think he did -- everything we asked him to do, he did. Everything that defense has asked for, we have complied with.

And I know that prejudice is not part of Rule 37, but this is -- this is not a -- they had the records. They knew the records. They never even asked or showed Mr. Faford the records to see if they could refresh his memory. They just chose to ask him about it and that was it.

I think -- I think these are very extreme sanctions

that they are asking for. I think 1 through 6 should be denied.

THE COURT: All right. Go ahead, Ms. O'Donnell. Any rebuttal?

MS. O'DONNELL: Your Honor, Mr. Pearlman cut you off at some point. You were saying something that I wanted to hear. Do you know remember what that was?

THE COURT: No.

MS. O'DONNELL: Okay. If this were Jeopardy or we were siting around playing poker, I would say, "Is it a coincidence that the injuries Mr. Faford doesn't remember are his back injuries, and in this case, he is claiming a back injury which totally disables him and he wants several million dollars for his total disability?" I would say that with some sarcasm.

But this, this is a serious situation where a plaintiff comes into federal court, has eminent counsel, files a complaint alleging negligence against his prior employer who continues to carry him on his health insurance, and then serves an answer to interrogatory that's false. And then we have to file a motion to compel and the Court has to get involved and specifically says, "Tell them" -- "You must list all medical providers with whom you have consulted in any way."

And what's his response? "Oh, it was a nurse." That's so denigrating to nurses.

But that is also beside the point, because we had doctors in Exhibit 3, and including that which I augmented this morning, Page ID 2894, 2895, doctors, 2893, who took him off work because of his back injuries. And yes, it's true, I said 12 over the course of 10 years and it was 10. I'm sorry, unlike Mr. Faford, I wasn't taken off work. If I were taken off work, I would remember, because of my back strain, sprain, spasms. And it's on page 6 of our brief, Page ID 2159, and he doesn't remember one of these 10, not one.

And then when asked a very specific, direct question by Mr. Russell, Exhibit 8 to Motion in Limine 114, Page ID 2196: "And other than your neck and midback, have you ever sustained any workplace injury to your lower back?"

"No."

Mr. Pearlman very cleverly calls them "events," but the doctors and the nurses called them lumbosacral sprain and strain repeatedly, low back pain, diagnosed with low back disorder pain syndrome. You get a diagnosis like that and you, quote, "forget," and your attorney calls it an event, when you're suing for a back injury and you have a federal judge telling you to list all your treaters and you don't.

Mr. Pearlman says that's an extreme sanction. No. Rule 37 says when you don't obey a District Court order, Roman Numeral V, dismissing the action in whole or in part.

Two, prohibiting the disobedient party from supporting

or opposing --

THE COURT: Don't read me the rule, Ms. O'Donnell. Do you have any rebuttal argument?

MS. O'DONNELL: I am continuing with my rebuttal argument, your Honor.

I believe that that which Mr. Russell and I are asking is reasonable with and consistent with what I just read, your Honor, Roman Numeral V under 37(b)(2), that he should be precluded from saying, "I didn't know," that this was just an event. He should be precluded because of his disobedience of a federal court order.

And because of the seriousness of this, your Honor, may I consult with Mr. Russell and inquire whether he has anything to inject into these proceedings? May I, your Honor?

THE COURT: No. You have made your argument. You have divided up this allocation of duties concerning the motions, the several motions that have been presented.

MS. O'DONNELL: That's fine, your Honor.

THE COURT: Just tell me what it is you want Mr. Faford to be precluded from doing.

MS. O'DONNELL: I want to preclude him from making any excuse for his failure to comply with a court order; to preclude him from making any excuse for why he lied at his deposition and why he served a false answer to an interrogatory; preclude him from giving these lame excuses

that, "I forgot, it was like going to my cabinet and getting aspirin"; and that I ask that you instruct the jury that the plaintiff is not permitted to make these instructions -- these excuses -- excuse me -- but plaintiff is precluded from making these excuses because he failed to comply with a court order by failing to serve Grand Trunk, whom he has sued, with a verified list of treaters; and that he served a false answer and he lied under -- at his deposition.

And that is why he is going to be excluded, ladies and gentlemen of the jury, from making these excuses, and that we're doing this short of dismissing his case. That's how serious it is when you lie at your deposition and you don't comply with a federal court order.

Thank you, your Honor.

THE COURT: All right. Rule 37 permits the Court to impose various sanctions in the event that a party fails to comply with an order to produce evidence.

Mr. Faford was instructed to give a list of treaters, I believe, from 1995 forward. He did not disclose any medical treatment that he received while he was working at Ford Motor Company, and some of that treatment had to do with complaints of back pain, also had to do with complaints of shoulder pain, but I don't know that there is much to the case about that.

The requests that the defendant makes in terms of preclusion require me to make a finding of credibility where

the plaintiff has offered explanations for why he did not recall. I suppose those explanations could be called into question given the gravity of the ailments that the medical records disclose, but I decline to make that credibility determination, because that's something that the jury is most capable of doing after hearing the list of medical providers, the contents of those medical records, and Mr. Faford's explanation, which he will be permitted to give.

I will, however, provide the defendant an opportunity to tender a jury instruction that explains that the Court entered an order requiring production of a list of medical providers and that the defendant did not identify the providers that rendered medical treatment during that time when he was at Ford Motor Company, and that whether or not he was deceptive in making nondisclosure is an issue that the jury can take into account in determining his overall credibility.

Beyond that, the motion is denied in all other respects.

Next we have item -- Docket Number 116. That has to do with whether or not the plaintiff's expert, Dr. Thomson, can testify that the loss of value of household services can be fixed at $25 per hour. I believe that the defendant -- I mean the plaintiff -- excuse me -- has conceded that Dr. Thomson does not intend to give any testimony to that effect and he will not take that position at trial.

Whose is this; Mr. Pearlman or Mr. Wilensky?

Mr. Pearlman, if it's yours, you are muted. You'll have to unmute.

MR. PEARLMAN: Thank you, Judge. Yes, I've got it.

And you're correct, we're not making a claim for lost household services. Dr. Thomson will not be asked any questions regarding value thereof.

THE COURT: Okay. And in that case, then, the motion will be granted and Dr. Thomson will not be able to give testimony regarding the loss of household services or valuation of that.

I don't think that there are any other motions in limine.

There is a motion to adjourn the trial. The trial has been adjourned.

We also have a final pretrial conference that is up to today. I'm not going to conduct that, due to the length of time we have spent on the motion arguments.

We do have a Zoom jury trial that is underway right now with Judge Goldsmith. I am going to reserve the right to the determine whether we will proceed in that fashion after I see the results of Judge Goldsmith's trial and I'm able to assess the utility of proceeding in that way.

If I determine that it is useful and that this case is an adequate candidate for that, I will hear arguments on

the defendant's motion to continue the trial, which is Docket Number 104, in which the defendant challenges the constitutionality of being able to proceed in the manner that I had suggested.

If I do intend to proceed that way, I will provide some background information and some documentation as to how we will proceed with a checklist and an opportunity for training, but I will not conduct a final pretrial conference until that date is determined and we can proceed from there.

So unless there is anything further from the plaintiff or the defendant, we will adjourn the proceedings today.

Mr. Pearlman, is there anything further from the plaintiff?

MR. PEARLMAN: I have just one question, Judge. You may not be able to answer it.

Can you give us any time frame as to when you will analyze this remote trial and make a decision?

THE COURT: Well, I mean, you have some depositions you have to take anyway, so it probably won't be before the end of the month, I can tell you that. I will give you advanced notice and work around your schedules, of course, to plan, in the event we go forward. And although, given the reports of the proliferation of the COVID infections in the state and the spiking numbers, I think it might be a little bit Pollyannaish to suggest that it might be a moot point because we could

convene in person, but nonetheless, I continue to hold out hope that this second-best alternative of remote proceedings can be discarded in favor of an in-person trial. So we will just continue to make those observations.

MR. PEARLMAN: Thank you, Judge.

THE COURT: I'm sorry, Mr. Pearlman, I can't be more specific than that.

MR. PEARLMAN: No, I appreciate the issue.

THE COURT: Mr. Russell, anything further from the defendant today?

MR. RUSSELL: Nothing further, your Honor. Thank you.

THE COURT: All right. Thank you. I hope you all stay well. Court is in recess.

MS. O'DONNELL: I'm sorry, your Honor. Your Honor, I'm sorry.

THE COURT: Yes, Ms. O'Donnell?

MS. O'DONNELL: Thank you.

When you were addressing Grand Trunk's fourth motion in limine, you said that the defendant can submit a court -- a jury instruction talking about the court order. Then I -- I wrote down that you said, "The plaintiff did not provide," and I assume you meant -- I'm sorry -- you said, "The defendant did not provide," and I'm sure you meant "The plaintiff did not provide," but I wanted the record clear.

THE COURT: Yeah. When I say "provide information,"

I was referring to the plaintiff's failure to provide information about his medical treaters.

MS. O'DONNELL: Thank you.

And then the second point I wanted to make, your Honor, is that Mr. Russell and I are in the middle of taking the trial deposition which was started by Mr. Pearlman of Mr. Faford's treater, and we did not get to our cross examination. And the first date that the doctor could offer us was June 21st at noon for Dr. Islam, is her name, for us to continue to take her evidence deposition. So that date is still out there. Of course, that was the soonest dated she would give us -- she could give us.

THE COURT: Mr. Pearlman, she is going to have to do better than that, and if so, I'll order her to be present. But that deposition, that trial deposition is going to have to be completed probably this month or at least in the first week of May. Other than that, she may not be able to be used as a witness. So you're going to have to get her to cooperate. If you need the Court's assistance, I'll provide it.

MR. PEARLMAN: Well, I'm going to do my best, Judge, although we left an hour and a half on the table because the defendants did not want to start the cross examination, so -- and they requested four hours for the examination, and that's the problem in trying to get the time.

THE COURT: You want four hours for a trial

deposition, Ms. O'Donnell?

MR. PEARLMAN: That is correct.

MS. O'DONNELL: Well, your Honor, we just wanted to be able to finish our cross examination, and we anticipated that with the objections being interposed by Mr. Pearlman that we would not be able to get done within an hour and a half, so we asked for more time. Yes, your Honor.

MR. PEARLMAN: Well, they're not going to -- they don't get that many objections on a trial dep from me, Judge, number one.

And number two, that's the problem. This is a very busy doctor at Henry Ford Hospital trying to block off four hours.

THE COURT: How long was your direct?

MR. WILENSKY: 50 minutes.

MR. PEARLMAN: Less than an hour.

THE COURT: All right.

MR. PEARLMAN: 46 minutes, as I recall.

THE COURT: I would think that -- I would think that two hours of the doctor's time should be sufficient, so make that arrangement. If it has to be done on a weekend or evening, then so be it.

MS. O'DONNELL: Well, I asked her that, Judge. Judge, I asked her that, if we could do it on a weekend or in the evening so that we could have time to finish our dep, our

cross examination, and she --

THE COURT: Ms. O'Donnell, you're winning this argument.

Mr. Pearlman, you're going to have to get her -- get it finished before June 24, I can guarantee you that.

MR. PEARLMAN: Okay. I understand that. But are you saying a two-hour time block for her?

THE COURT: I'm not going to limit her to two hours, but two hours ought to be sufficient if you're dealing with a doctor's schedule.

MR. PEARLMAN: Okay.

THE COURT: All right. Thank you.

MR. WILENSKY: Your Honor, may I ask a question? You mentioned that Judge Goldsmith has a virtual trial going on right now. Do you know whether the Court's office or Judge Goldsmith's chambers came up with virtual trial protocols that we might be able to see so we can prepare if that eventuality happens in our case?

THE COURT: Yeah, I think he did, and if we happen to go forward in that vein, I will make them available to you.

MR. WILENSKY: Okay. Thank you.

THE COURT: All right. Thank you.

MS. O'DONNELL: Our clients were -- and may still be -- I don't see their names here.

Your Honor, will Ms. Pinkowski reschedule the final

pretrial conference?

THE COURT: Yeah. I told you we will reschedule all of those things after -- once we establish a trial date.

MS. O'DONNELL: Okay. Thank you, your Honor.

MR. PEARLMAN: Is somebody going to tell our clients that they can leave? I don't know how --

THE COURT: I'll leave that to you.

MR. PEARLMAN: Well, I don't know how to get ahold of them.

THE CLERK: This is Susan. I'll open up the meeting and see if anybody is in there and let them know.

MR. PEARLMAN: Thank you, Susan.

THE CLERK: But I can't do that until this ends.

MS. O'DONNELL: Thank you, Ms. Pinkowski.

THE COURT: All right. Court is in recess.

(Proceedings adjourned at 1:04 p.m.)

* * *

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Rene L. Twedt April 29, 2021
RENE L. TWEDT, CSR-2907, RDR, CRR, CRC Date
Federal Official Court Reporter